No. 1393.

Order of Discontinuance for Costs.

Filed Feb. 13, 1899.

No. 423.

Brief of Hutchings for Appellee

SUPREME COURT OF THE UNITED STATES

Filed Feb. 13, 1899.

OCTOBER TERM, 1898.

No. 423.

WILLIAM STEPHENS ET ALS, APPELLANTS,

vs.

THE CHEROKEE NATION, APPELLEE.

APPEAL FROM THE UNITED STATES COURT IN THE INDIAN TERRITORY, NORTHERN JUDICIAL DISTRICT.

BRIEF ON BEHALF OF APPELLEE.

By William T. Hutchings.

The Phoenix Printing Company, Muskogee, Ind. Ter.

In the United States Court of Appeals

FOR THE INDIAN TERRITORY.

OCTOBER TERM, 1898.

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WILLIAM STEHPENS ET AL,

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THE CHEROKEE NATION.

BRIEF OF APPELLEE.

There have been set for hearing along with this case some sixty others involving much the same facts and principles. We shall, therefore, endeavor to make our argument cover, as far as possible, all the principles which should, in our opinion, govern the determination of all the cases.

I.

THE JURISDICTION OF THIS COURT.

The first question, therefore, that confronts us is what powers and jurisdiction were conferred upon this Court by the Act of Congress. It will be found in the Indian Appropriation Bill, approved July 1, 1898, *Public, No. 175, page 23*, and is as follows:

"Appeals shall be allowed from the United States Courts in the Indian Territory direct to the Supreme Court of the United States to either party, in all citizenship cases, and in all cases be-

tween either of the Five Civilized Tribes of the United States involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands, in the Indian Territory, under the rules and regulations governing appeals to said court in other cases: Provided, That appeals in cases decided prior to this Act must be perfected in one hundred and twenty days from its passage; and in cases decided subsequent thereto, within sixty days from final judgment; but in no such case shall the work of the Commission to the Five Civilized Tribes be enjoined or suspended by any proceeding in, or order of, any court, or of any judge, until after final judgment in the Supreme Court of the United States. In case of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible."

While the language in this clause is not very clear, still no other construction can be put on it than that the only power that this Court has in the trial of these citizenship cases is to determine the constitutionality or validity of the legislation. It is true that it says appeals shall be allowed in all citizenship cases, but the rest of the sentence modifies that statement and gives to it quite a different meaning from what it would have did it stand alone. If the latter part of the sentence does not qualify the first part, it is then surplusage and without meaning. It cannot be practically applied to any case. But we are not left to determine this question to the language of the Act alone, but can, we think, with propriety, look to the history of the legislation itself and the general policy of Congress in conferring jurisdiction on this court. There were a number of amendments to the bill touching the subject of appeals in citizenship cases arising in the Five Civilized Tribes. In all of them except the one which passed finally, there was provision for a general appeal on the whole case, giving the court full jurisdiction to determine all the questions in the cases and to try them in fact *de novo*. We instance the following as an amendment proposed by the Senate to the Indian Appropriation Bill. (*H. R. 6896.*)

"That all parties to cases of application for citizenship in the several tribes in Indian Territory, including the several tribes, in which appeals were duly taken under act of Congress, approved June tenth, eighteen hundred and ninety-six, from the decision of the Commission to the Five Civilized Tribes to the United States Court, and which have been determined by said Court before the passage of this Act, may, within ninety days hereafter, appeal such cases to the Court of Appeals of said Territory; and parties to such cases which may hereafter so determined may, within sixty days from date of judgment, take such appeal; and from the decision of said Court of Appeals, appeals and writs of error shall in all cases be allowed to the Supreme Court of the United States."

But this and none of the other amendments suggested, which were to unload this enormous work upon this court, were agreed to until finally the question was narrowed down to the consideration of the validity and constitutionality of the law which conferred upon the Dawes Commission the right to try the cases. This was in harmony with the previous Acts of Congress, especially in cases in which appeals are allowed direct to this court. The Appellate Court Act of March 3, 1891, Section 5, Sub-division 5, has this provision in enumerating the instances in which appeals or writs of error may be taken direct to this court: "In any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question." Certainly no greater privileges should be given to a citizenship applicant than are given to the ordinary litigant who happened to have his property rights in litigation in the Federal Courts. This question, however, has not been raised in the assignments of error of more than two or three of the cases before this Court. It was raised in the United States Court and counsel for the appellee offered to confess the question and admit that the legislation was invalid. They, however, had asked too much and found themselves in the same predicament that they are in here. If the legislation is valid the cases must be

affirmed and they get nothing. If the legislation was invalid the cases go out for want of jurisdiction in the lower Court and they are in exactly the same position as before the passage of the law—non-citizens of the Cherokee Nation, with no tribunal to adjudge them otherwise, and with no power on the part of Congress to create one. Another reason which we think is potent in determining this question, is that most of the cases had already been disposed of and the judgments had become final prior to the passage of the law. If the law was invalid or unconstitutional claimants could still have come to this Court upon those questions by a writ of *certiorari;* so Congress considered it might as well permit them, under a general law, to do by appeal what they might have done in another way. The question was brought to the notice of the various committees and they could not, with the lights before them, have intended to do more than what it seems their language imports—the clothing of this Court with jurisdiction *solely* to investigate the constitutionality and validity of the law.

II.

CONGRESS HAD NO POWER TO PASS A LAW GRANTING AN APPEAL FROM JUDGMENTS WHICH HAD BECOME FINAL BEFORE ITS PASSAGE.

The law under which the Dawes Commission decided the citizenship cases was approved June 10. 1896, and is as follows:

"That said commission is further authorized and directed to proceed at once and hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled: Provided, however, that such application shall be made to such commission within three months after the passage of this Act.

"The said commission shall decide all such applications, within ninety days after the same shall be made.

"That in determining all such applications said commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages and customs of each of said nations or tribes: And provided, further, that the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said roll as a citizen of either of said tribes and whose right thereto has either been denied or not acted upon, or any person who may within three months from and after the passage of this Act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes of such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.

"In the performance of such duties said commission shall have power and authority to administer oaths, to issue process for and compel the attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving such testimony are dead or are now residing beyond the limits of said Territory, and to use all fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes: Provided, That if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the commission provided for in this Act, it or he may appeal from such decision to the United States District Court: Provided, however, that the appeal shall be taken within sixty days, and the judgment of the court shall be final."

It will be seen then that not only was no further appeal provided for in that law, but it was unequivocally provided that the judgments of the United States Courts should be final. Technically speaking, there was really no appeal at all given from the Dawes Commission. The United States Courts in the Indian Territory are neither district nor circuit courts of the United States.

Ex parte Mills, 135 U. S., 263; L. Ed., 34, 107.

But by a most liberal construction and a good stretch, it was,

to carry out the badly expressed intention of Congress, decided to permit these appeals to the United States Court in the Indian Territory. Every case before this court today had been decided and a final judgment rendered therein prior to the passage of the law allowing appeals to this court. If that law professes to do more than we have contended for it is obviously unconstitutional and void. In the first place it would deprive the Cherokee Nation of the vested rights it had in those final judgments, and it would be an unjust encroachment of one department of our Government on another separate and distinct department, which cannot be lawfully done. (*U. S. vs. Klein, 13 Wall, 128.*) The legislature may alter and control remedies, but when the case has proceeded to judgment it has passed beyond its power. It has been uniformly held by all the courts of this country, with possibly two exceptions, that the legislature has no power to grant a new trial or direct a re-opening of a cause which has once been judicially settled, and that every such attempt is an invasion on the part of the legislature of the judicial power of the government and is therefore unconstitutional and void.

The Cherokee Nation, one of the parties to the controversy, is satisfied with the final judgments of the proper court of last resort as provided in the Act of June 10, 1896, which was the United States Court for the Northern District of the Indian Territory, which embraces the Cherokee Nation, and contends that Congress cannot disturb the rights acquired under these final decrees; that a legislative act cannot grant an appeal from a final decree of a court of record made prior to the enactment of such law, the decree having been made under an existing law, that made that decree final; that such law can only operate as to future cases—it cannot have a retroactive effect; that the judgment is essentially the property of the successful party, and he

cannot be subjected to the vexation, hazard, risk, and expense of another contest; that if these contentions were not true, the legislative branch of the Government would override the judiciary and there would be no stability or confidence in the finality of contests under this branch of the Government; that it would impair and divest vested rights.

Rights secured by judgment cannot be divested.

Wade on Retroactive Laws, Sec. 172, page 203, says: "The rights secured to either party to a suit by an adjudication of the matter in controversy between them are propriatary rights which the Constitution will protect.

"The rights secured by the judgment are such as the law gives to the prevailing party when it is rendered. To materially enhance or diminish those rights is to work a deprivation of the rights of one or the other of the parties. In *Atkinson vs. Dunlap, 50 Me., 111*, notwithstanding a previous conflicting decision by the same court, it was held that a statute allowing previously adjudicated cases in which existing remedies had been exhausted, and the judgments had become final by the expiration of the time limited for appeals or reviews, was manifestly unconstitutional, citing *2 Me., 275*, and *15 Pa., St. 18*."

Contra, Henderson & Nashville R. Co. vs. Dickerson, 17 B. Mon., 177, the same author in the same section, 171, says, in discussing this case, that it "was decided prior to the adoption of the 14th amendment to the National Constitution, otherwise the objection might have been noticed that the re-opening of a controversy in which final judgment had been rendered amounted to a law depriving the judgment-creditor of property without due process of law. * * * The eye of the Court seems to have been so firmly fixed upon the supposed hardships under which the failing party labored—of having no 'opportunity which other litigants had, to correct any errors that may have been committed' —that it overlooked the vicious principle which gave the legisla-

ture plenary control over final judgments. If the constitutional provisions referred to were insufficient to protect judgments, final and conclusive, under the law as it existed at the time of their rendition, because there was no appeal, then they would be insufficient to secure the rights of judgment-creditors after affirmance by the court of last resort."

"Litigation would have no end so long as the legislature maintained the power to reopen a case in which possible errors may have been committed. 'The law of the land,' instead of being the law as it existed when the rights under it accrued, would mean nothing more permanent than the transient caprice of the legislature. These bodies ordinarily find sufficient occupation in correcting their own errors without undertaking to rectify those committed by the courts and juries. 'A judgment-creditor may by legislative tergiversation be kept out of his own for an indefinite period of time, and he will not be permitted to enforce his judgment until the legislature has grown tired of granting appeals to his adversary.'"

In *Hill vs. Sunderland, 3 Vt., 570*, "it was held that a legislative act giving the right of appeal from the decision of road commissioners was void, as applied to an award already made, under a law as it existed at a time."

"Legislature cannot interfere. The power to open or vacate judgments is essentially judicial. Therefore, on the great constitutional principle of the separation of the powers and functions of the three departments of government, it cannot be exercised by the legislature. While a statute may indeed declare what judgments shall in future be subject to be vacated, or when or how or for what cause, it cannot apply retrospectively to judgments already rendered and which had become final and unalterable by the court before its passage. Such an act would be unconstitutional and void on two grounds; first, because it would unlawfully impair the fixed and vested rights of the successful litigant; and, second, because it would be an unwarranted invasion of the province of the judicial department."

Black on Constitutional Prohibitions, Sec. 197, pages 250, 251, 252, says:

"If the legislature cannot invade the province of the courts by imposing upon them, by a retroactive statute, the necessity of adopting a different interpretation of an existing law from that

which they had already placed upon it, it follows, *a fortiori*, that the legislature cannot directly control the action of the courts by setting aside their judgments or ordering a reconsideration of adjudications they have duly and formally reached. Hence an act of the legislature awarding a new trial in an action which has been decided in a court of law is unconstitutional. Thus it was said by Chief Justice Gibson: 'If anything is self-evident in the structure of our Government, it is that the legislature has no power to order a new trial, or to direct the court to order it, either before or after judgment. The power to order new trials is judicial, but the power of the legislature is not judicial. The legislature has gone no farther than to order a rehearing on the merits; but it is not more intolerable in principle to pronounce an arbitrary judgment against a suitor than it is injurious in practice to deprive him of a judgment, which is essentially his property, and to subject him to the vexation, risk, and expense of another contest. Hence it will appear that a statute of this character is not only a practical assumption of judicial power, but also is obnoxious to the provisions which guard vested rights from invasion, and is therefore properly within our subject, and objectionable because of its retroactive effect upon past transactions.' "

Section 198, pages 252 and 253: "On the same principle it is held that the legislature has no constitutional power to grant to a party litigant a right to an appeal or writ of error, in a case where no such right existed when judgment was pronounced, or where the right has been definitely forfeited."

Section 199, page 253: "In accordance with the principles already announced, it is well ruled that a statute authorizing the opening of judgments rendered since a certain anterior date, impairs vested rights and infringes on the judicial department of the Government."

Merrill vs. Sherburne, 8 Amer. Dec., 52.

Stanford vs. Barry, 15 Amer. Dec., 691.

Ratcliffe vs. Anderson, 31 Gratt, 105; 31 Amer. Rep., 716.

Willingsby vs. George, 5 Colo., 80.

Hewitt vs. Colorado Springs, 5 Colo., 184.

Burch vs. Newberry, 10 N. Y., 374.

Snyder vs. Palmer, 32 Wis., 406.

Denny vs. Matton, 5 Allen, 379; 79 Amer. Dec., 784.

Bush vs. Williams, 24 Ark., 96.

Martin vs. So. Salem Land, No. 26, S. E., 591.

Penn vs. Wheeling, etc., Bridge Co., 18 How. 421.

Story vs, Runkle, 32 Tex., 398.

In Re Handley, 49 Pac., 829.

1 Freeman on Judgments, Sec. 90.

Smith Stat. and Const. Law, Sec. 340.

6 *Amer. and Eng. Enc. of Law, p. 1038, 2nd Ed.*

In the case of *McCullough vs. Commonwealth of Virginia*, decided at the October 1898, term of this court, advanced sheets of Reporter No. 5, page 123, Mr. Justice Brewer, who delivered the opinion of the Court, makes this very clear statement of the law which we think has equal application to the legislation of Congress:

"But there are more substantial reason than this for not entertaining this motion. At the time the judgment was rendered in the circuit court of the city of Norfolk the Act of 1882 was in force, and the judgment was rightfully entered under the authority of that act. The writ of error to the court of appeals of the state brought the validity of that judgment into review, and the question presented to the court was whether at the time it was rendered it was rightful or not. If rightful the plaintiff therein had a vested right which no state legislation could disturb. It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases."

Black's Constitutional Law, page 259, Sec. 99, goes even further, and says:

* * * "But a case which has been submitted for decision to a court of record is not subject to any control by the legislature."

Lanier vs. Gallatas, 13 La., Ann. 175.

Sutherland on the Statutory Construction, p. 628, Sec. 480, is strong and conclusive:

"When a right has been perfected by a judgment, the fruits of recovery cannot be diverted by new legislation, nor subjected to new hazard by reviving a new right to appeal or some other mode of review."

Congress can no more pass laws which have the effect of divesting vested rights than can the state legislatures.

This inhibition was imposed by the 5th Amendment to the Constitution, which declared that no person should be deprived of his property without due process of law.

Wade on Retroactive Laws, Secs. 156, 157, 264.

Steamship Co. vs. Joliffe, 2 Wall., 450.

Fletcher vs. Peck, 6 Cranch, 87.

Memphis vs. U. S., 7 Otto, 293.

7 Lawson's Rights and Remedies, Sec. 3850.

Black on Const. Prohibitions, Secs. 176, 183, 207.

Sutherland on Statutory Constructions, Sec. 480.

3 Amer. and Eng. Enc. of Law, pp. 756-760, 2nd Ed.

The Society, etc., vs. New Haven, 8 Wheat, 493.

Wilkinson vs. Leland, 2 Peters, 657.

Ferguson vs. Williams, 13 N. W. Rep., 49.

The cases of *Watson vs. Mercer, 8 Pet., 88,* and *Satterlee vs. Matthewson, 2 Pet., 380,* do not contravene this. These cases arose under State laws, and at the time they were decided there was no clause in the Constitution of the United States prohibiting the States from passing laws that had no other effect than to divest vested rights. No such decision would now be rendered since the 14th Amendment to the Constitution. Nor would any such have been made had the act under consideration in those

cases been passed by Congress, for it was forbidden as we have shown above, from passing laws divesting vested rights. In other words there was nothing in the act involved in these cases in violation of the Constitution of the United States as it then stood, and that was the only error the Court could pass on.

Wade on Retroactive Laws, Sesc. 159, 191, 261.

What then is a vested right?

Says the Supreme Court of the United States in *Steamship Co. vs. Joliffe, supra:*

"When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

Wade in Sec. 157, page 190, of his Work on Retroactive Laws, says: "Any right or thing which may be owned, bought, sold, or assigned may be considered as a vested right, in the sense that the owner cannot be deprived of it otherwise than by 'due process of law' or 'the law of the land.' Unless something answering the description of due process of law is required by a retrospective statute which authorizes the transfer of a private right from one person to another, this provision of the Constitution is clearly violated, whether the right arose in contract or not."

It is thus defined by *Mr. Black, in Section 154, of his Work on Constitutional Law:* "Vested rights are rights which have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or cancelled by the act of another private person, and which it is right and equitable that the Government should recognize and protect, as being lawful in them-

selves and settled according to the then current rules of law, and of which the individual could not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare. A vested right, as distinguished from an interest in expectancy or a contingent interest, is a right of action or property immediately fixed in some particular person or persons."

See also:

Fletcher vs. Peck, 6 Cranch, 87 L. Ed., 162, notes.

Goshen vs. Stormington, 10 Amer. Decs., 134.

Lowe vs. Harris, 17 S. E., 539.

Grove vs. Todd, 20 Amer. Rep., 79.

3 Amer. Eng. Enc. of Law, 758, 2nd Edition.

The matter involved in these cases was a share in the communal property of the Cherokee Nation, which consisted of land and money. The decision rendered in the cases deprives these claimants of any interest in that property adjudging the fact that they were not citizens of the Cherokee Nation, and could not share with the recognized citizens of said nation in its property. If any of these cases were tried upon their merits and reversed the necessary effect would be to take a citizen of the Cherokee Nation and give to these claimants, or such as were successful, a share of land and money which would otherwise be theirs, and which, under the judgment of the lower Court have been adjudicated theirs.

III.

THE CASES WERE PROPERLY TRIED BELOW BY THE COURT.

It has been contended in some of the cases, and assigned as error in this court, that when they were brought to the United States Court below they should have been tried by a jury and not

by the Court sitting as a chancellor. This may be successfully answered by saying that no jury trials were ever requested in any of the cases; but it may be more successfully answered by stating that the law made such a trial improper. The law quoted above, giving the appeal, stated that the tribe or any person "May appeal from such decision to the United States Court." In the modern legislation of the various states the term appeal is used in different senses, and has, to a great extent, lost its distinctive meaning, but we believe in the legislation of Congress it never has. In such legislation it has always been understood in its technical sense as expressive of the civil law mode of removing a case to a higher tribunal and placing the case in the latter court to be tried *de novo* upon its merits.

U. S. vs. Goodwin, 7 Cranch, 110.
U. S. vs. Tenbroek, 2 Wheat, 248.
Noe vs. U. S., Hoffman Land Case, 242.

IV.

SOME OF THE APPEALS NOT PERFECTED IN TIME.

In most of the laws passed by Congress as well as those passed by the various states the time prescribed within which appeals may be taken is complied with when the appeal is allowed. In other words, two, three or four months, as the case may be, is allowed within which to sue out an appeal or writ of error. The law regulating appeals in these cases, however, is very differently worded and reads as follows: "That appeals in cases decided prior to this Act must be perfected in 120 days from its passage, and any case decided subsequent thereto within sixty days from final judgment." All of the cases under consideration were decided prior to the Act, and the limit for perfecting the appeals

expired October 29, 1898. Now, certainly the appeal could not be perfected within that time without filing a transcript of the record in this court. But we believe that even more was necessary to perfect the appeal; that the docket fee must have been paid and the case actually put upon the docket of the court. Quite a number of these cases were filed in this court subsequent to October 29th, while there are at least some six or eight in which the appeals were not allowed in the lower Court until after that time. Surely these cases will be dismissed upon the inspection of the filing mark.

V.

WHAT CONSTITUTES A RIGHT TO CITIZENSHIP IN THE CHEROKEE NATION?

Of the thousands of cases which come before the Dawes Commission upon applications for enrollment as citizens of the Cherokee Nation, there were comparatively few in which the facts were seriously controverted. To the mind of counsel for the Cherokee Nation a proper determination of the law governing such cases, settled for itself, nine out of ten of such cases. The question therefore, and the main question which confronts us, was, what was the jurisdiction conferred upon the Dawes Commission, and what class of applications could properly be considered by them? Our position before the commission, and before the United States Court was, that they were sent to the Indian Territory by Congress, not to make citizens of the Cherokee Nation by naturalization, but to make a complete roll of all Cherokee citizens.

Everyone at all acquainted with the appointment of the commission knows that the extra jurisdiction conferred upon them by the Act of June 10, 1896, was obtained through the influence and

pressure of men who claimed to be Cherokee citizens, many of them having, as they alleged, been admitted to citizenship, and afterwards decitizenized by the authorities of the nation. Therefore, waiving for the present, any question of the power of Congress to confer upon the commission such judicial functions and jurisdiction, and assuming that the conferring of such powers was not in conflict with the constitution of the United States, or any treaty or contract heretofore made by the United States with the Cherokee Nation, we submit that the power conferred upon the commission by the act before mentioned, was simply to determine, who among the Cherokees are citizens of the nation, and ought to be so regarded, but who are denied the rights and privileges of such by said nation. Before, therefore, considering the question, we must discuss the whole question of Cherokee citizenship.

VI.

WHO ARE CITIZENS OF THE CHEROKEE NATION?

The Cherokee Nation, like most peoples in the initial period of their national life, had for its government a sort of common or unwritten law. This is recognized in all the treaties made with it, and all the laws of Congress passed for its government, and is designated "Usages and Customs." From its earliest existence, and before it had any written law, rights and immunities in the Cherokee Nation were incident exclusively to membership or citizenship in the nation. All the rights, privileges and immunities exercised by its members sprang exclusively from citizenship. There is no such a thing as a property right in the Cherokee Nation as apart from citizenship. Prior to the adoption of a written constitution, membership in, and permanent abode with the taibe, alone entitled one to share in the benefits of the property and annuities of the nation. In fact, up to a few years prior

to 1827 there had been little occasion to call in question the status of the Cherokee people as a nation. Then arose the great question of the right of the State of Georgia to extends its laws over the Cherokee Nation, and the further question, both in Georgia and North Carolina, of extinguishing the title to the Cherokee lands within the limits of those states. Therofore, at a general convention of delegates held at New Echota, July 26, 1827, a constitution was adopted for the nation predicated upon their assumed sovereignty and independence as a distinct nation. In this constitution was clearly defined who were entitled to citizenship, and what were the rights incident to the same, as will be seen by the extract below:

"*Constitution of the Cherokee Nation Formed by a Convention of Delegates From the Several Districts, at New Echota, July, 1827.*

ARTICLE I.

"Sec. 2. The sovereignty and jursidiction of this government shall extend over the country within the boundries above described, and the lands therein are, and shall remain, the common property of the nation; but the improvements made thereon, and in possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them: Provided, That the citizens of the nation, possessing exclusive and indefeasible right to their respective improvements, as expressed in this article, shall possess no right nor power to dispose of their improvements in any manner whatever to the United States, individual states, or individual citizens thereof; and that whenever any such citizen or citizens shall remove with their effects out of the limits of this nation, and become citizens of any other government, all their right and privileges as citizens of this nation shall cease: Provided nevertheless, That the legislature shall have power to re-admit by law to all the rights of citizenship, and such person or persons, who may at any time desire to return to the nation on their memorializing the General Council for such re-admission. Moreover, the legislature shall have power to adopt such laws and regulations, as its wisdom may deem expedient and proper, to prevent the citizens from monopolizing improvements with a view of speculation.

ARTICLE II.

"Sec. 4. No person shall be eligible to a seat in the General

Council, but a free Cherokee male citizen, who shall have attained to the age of twenty-five years. The descendants of Cherokee men by all free women, except the African race, whose parents may have been living together as man and wife, according to the customs and laws of this nation, shall be entitled to all the rights and privileges of this nation, as well as the posterity of the Cherokee women by all free men."

The next Council which met also passed a law with reference to the rights of intermarried citizens which is as follows:

"Resolved by the National Committee and Council in General Council Convened, That from and after the passage of this Act, any person or persons, not citizens of the nation, who shall marry according to the law in this nation and lose by death a wife or husband as the case may be, and not having a child or children by him or her to whom so married, shall be deprived, and is thereby deprived of citizenship, by the death of the Cherokee citizen or citizens, that created his or her right, i. e., the right of the said white person or persons or any such, who has become citizens by marriage with any citizens of this nation.

"Be it further Resolved by the authority aforesaid, That any such citizen or citizens as aforesaid, who shall lose by death, a wife or husband, as the case may be, and have a living child, or children, the fruit of any marriage according to law, shall be and continue a citizen or citizens of the Cherokee Nation so long as they shall remain single or shall marry any other citizen of the nation again.

"Be it further Resolved by the aforesaid authority, That any such person or persons aforesaid who shall lose a wife or husband, as the case may be, by death, and have a child or children, the fruit of such lawful marriage, and shall marry a white person or persons of such as come into the nation, or any other by the law of marriage, shall upon and by such marriage aforesaid, destroy and nullify, his or her rights, as the case may be, who shall marry, to citizenship in this nation; and so long as he, she, or they of such persons aforesaid, shall remain in the country, shall be considered intruders upon the soil of the nation, and be liable to expulsion and removal from the nation according to the laws made and provided in such cases.

"Approved: JOHN ROSS.

"New Echota, Oct. 15, 1829."

The constitution of 1827 was, of course, framed by the Eastern Cherokees, the United States Government at that time recognizing two branches of the Cherokee Nation, from each of

which accredited delegates were received in Washington, the other branch being the Old Settler or Western Cherokees, those who had from time to time since 1804 migrated west of the Mississippi and settled in Arkansas. By the treaty of 1835, and "The Act of Union Between the Eastern and Western Cherokees" entered into July 12, 1839, the two branches of the Cherokee Nation were again united. The constitution which followed that declaration of union provides:

"Sec. 2. The lands of the Cherokee Nation shall remain common property; but the improvements made thereon, and in possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them: Provided, That the citizens of the nation possessing exclusive and indefeasible right to their improvements, as expressed in this article, shall possess no right or power to dispose of their improvements, in any manner whatever, to the United State, individual States, or to individual citizens thereof; and that, whenever any citizen shall remove with his effects out of the limits of this nation, and become a citizen of any other government, all his rights and privileges as a citizen of this nation shall cease: Provided, nevertheless, that the National Council shall have power to re-admit, by law, to all rights of citizenship, any such person or persons, who may, at any time, desire to return to the nation, on memorializing the National Council for readmission."

Such remained the law of the Cherokee Nation until the change of its constitution was necessitated by the changed conditions growing out of the treaty of 1866. Under the operation of that treaty, freedmen who had been former slaves of Cherokee citizens and free colored persons, under certain conditions, as well as certain registered Delawares and Shawnees, became incorporated into its body politic. On November 26, 1866, therefore, the Constitution of 1839 was amended to meet these changed conditions, and we find in *Section 5, of Amendments of Article 3, on pape 33 of the Laws of the Cherokee Nation, 1892*, the following recognized classes of citizens:

"No person shall be eligible to a seat in the National Council

but a male citizen of the Cherokee Nation who shall have attained the age of twenty-five years, and who shall have been a *bona fide* resident of the district in which he may have resided, at least six months immediately preceding such election. All native born Cherokees, all Indians, and whites legally members of the nation by adoption, and all freedmen who have liberated by voluntary act of their former owners or by the law, as well as free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months from the 19th day of July, 1866, and their descendants, who reside within the limits of the Cherokee Nation, shall be taken, and deemed to be citizens of the Cherokee Nation."

It will be seen all through this legislation that a special emphasis is put upon the requirements of permanent residence by its citizens in order to maintain their standing as such.

VII.

HOW CAN CITIZENSHIP BE LOST OR FORFEITED?

Any nation of people which possesses any of the elements of sovereignty has the inherent right to determine who shall be its citizens, who shall become its citizens and how such citizenship may be lost or forfeited. We have seen in the various provisions of the Constitution of the nation above set forth, that citizenship in the Cherokee Nation may be lost by abandonment by all classes and by remarriage on the part of the white adopted citizens, who may after the decease of the Indian wife or husband marry any person not having the rights of Cherokees by blood. (*Section 666, Cherokee Laws of 1892.*) This section was quoted and its legality approved in case of *Nofire vs. U. S., 164 U. S., 657.* This loss by abandonment has been the common law of all Indian Nations, although prior to any written laws on the subject, a return to the nation and a declaration of the intention of a permanent residence with it, *ipso facto*, restored the prodigal to his rights of citizenship. The first written laws of the Cherokee Na-

tion were passed May 6, 1817. They were composed of six articles, the third of which was as follows:

"The authority and claim of our common property shall cease with the person or persons, who shall think proper to remove themselves without the limits of the Cherokee Nation.

"Approved May 6, 1817."

Before ever this law assumed a written form, a large number of Cherokees, as mentioned above, were living on Arkansas public lands, and were receiving no share of the annuities and common funds of the nation, and did not, until the treaty of 1817 was made, when the nation proper consented to a division with them. And, even then, they did not receive any of the past annuities which, since their removal West, had been paid wholly to those of the nation who remained East, in accordance with their usages and customs. We see, then, from time immemorial, that this much talked of birthright in the Cherokee Nation was not a property or a vested right, but simply a right to citizenship which could be forfeited and regained in accordance with the laws of the nation whose subject the citizen was. An Indian may expatriate himself from the nation of which he is a subject as effectually as can the citizens of any other government upon the globe.

Elk vs. Wilkins, 112 U. S., 94; 28 L. Ed., 643.

In this case it was held that the Indian, Elk, was not a citizen of any government; that he had lost his citizenship in the tribe to which he had belonged, by abandonment; that he had not become a citizen of the United States because he had not been legally naturalized; that he stood in the position exactly of that great body of immigrants who have left their homes in foreign lands to come to America with a fixed purpose and declared intention of permanently abiding here, but have not yet become United States citizens by compliance with the naturalization laws of our land.

Mr. Justice Richardson, in *Eastern Band of Cherokees vs. United States, 20 Court of Claims, page 474*, said of those Cherokees who failed and refused to migrate West with the great body of their people under the treaty of 1835, but chose to remain East and identify themselves with the people of their irrespective states:

"They have expatriated themselves from the Cherokee Nation, and become denizens and subjects, if not citizens, of the states where they reside. Thomas, their agent and attorney, wrote that by the Constitution and laws of the state they had the right to vote, though they seldom exercised it, lest by identifying themselves with one political party they should give offense to the other. (*Ex. Doc. No. 298, last Session 29th Congress, page 181.*) Whatever organizations they subsequently effected must have been mere social organizations, with no power as an independent nation of their own to make laws or to do other national acts. That follows from their relation to the State of North Carolina.

"They were never afterwards recognized by the United States as any part of the Cherokee Nation, as a body politic."

Even in the case of Elk, above, he having abandoned his tribe and married a citizen of the United States, having taken up his abode in the State of Nebraska, and made that state his domicile, his descendants, after that time, born in the State of Nebraska, would, beyond doubt, be citizens of the United States and of the State of Nebraska.

Ex parte Reynolds, 18 Albany Law Journal, 8;5 Dillon, p. 396.

Gee Fork ..... vs. U. S., 1 C. C. A., 211.

It is contended by our adversaries, however, that the right of Cherokee citizenship cannot be forfeited; that it is an inheritable right which children inherit from their fathers and mothers under some law of descent and distribution, and is not impaired by forfeiture of citizenship. They claim this principally by virtue of certain language made use of in several of the treaties made with the Cherokees, particularly that of 1817 and 1846, in which

occurs the expression, "The whole Cherokee Nation." The facts which gave rise to this expression in the treaty of 1817 were these: It had been the policy of the Federal Government from the beginning of its official relation with the Cherokees to encourage and assist the individuals of the nation in embracing the pursuits and habits of civilized life. Game was disappearing east of the Mississippi and they must become farmers and stock-raisers, with the alternative of starvation.

Considerable annual expenditures were made in the purchase for the Indians of agricultural and domestic implements. The result of this was that in the early part of the nineteenth century we find the Cherokee Nation divided into what was known as Upper and Lower, or "hunter" Cherokees, the former being cultivators of the soil and desirous of dividing their lands in severalty and becoming citizens of the United States, while the latter were addicted to hunter life, and indosposed to adopt civilized habits.

Propositions were advanced on the part of the Government as early as the 1st of May, 1808, when a delegation from the Upper Cherokees visited Washington, looking to a division of the territory between these two branches, and of remedying what was claimed at that time had been going on, an unequal distribution of annuities between the Upper and Lower Cherokees.

Early in February, 1809, President Jefferson had an interview with the representatives of the Lower Cherokees, and approved their plan of sending a delegation to visit the Arkansas and White river countries in search of a suitable location. A suitable location was found and a large number of Cherokees signified their willingness to remove, but the Government failed to make any appropriation for the payment of the expenses of

their removal. However, owing to their dissatisfaction with the terms of the treaty of 1785, a number of Cherokee families left the nation and formed a settlement in Louisiana, then a province of Spain, from whence in a few years they removed to a more satisfactory location on White river. Here they were joined from time to time by their Eastern brethren until, prior to the treaty of 1817, they numbered between two and three thousand souls. During all this time they neither received nor claimed any annuities, or other rights as Cherokees, but had carried with them, just as the common law follows every settlement or community of English speaking people as a heritage, the laws, customs and usages of their nation. They had never become citizens of, or identified with, any state, territory or other government, but had kept up their ancient organization and maintained the distinctive character of Cherokees; so that when the treaty of July 8, 1817, was negotiated (*U. S. Stat. at large, Vol. 87, p, 156*), the Government of the United States recognized them as a constituent part of the Cherokee Nation, and received as their accredited deputies John D. Chisholm and James Rogers, and the treaty with the joint contract with the three parties to it, to-wit: The United States and the representatives of the Cherokee Nation east of the Mississippi river, and those on the Arkansas river. It is therefore noticeable in the fourth section of said treaty that provision was made only for the future annuities to be divided between the Cherokees on the Arkansas. From that time on, there were two distinct branches of the Cherokee Nation, and under the treaty of 1817 the Cherokees continued to migrate to the Arkansas country. That state of affairs gave rise to the expression in the first place. A further sketch of their history from then on up to 1846 will clearly show its meaning as used in that treaty. Some of those who had consented under the treaty of 1819 to move to the

Arkansas country subsequently concluded to remain with the Eastern branch. These found themselves in an annoying position; the Government had recognized two separate branches of Cherokees and two sets of citizens. Their share of annuities was being paid under the treaty of 1819 to the Cherokees on the Arkansas and they were not even allowed to vote, hold office, or participate in any of the affairs of the nation East, they having abandoned by express contract all of their rights of citizenship in the original Cherokee Nation. The Government then held that they were not a part of the body politic of the nation proper, but must remove to Arkansas at their own expense. (*Instructions of the Secretary of War to Agent Meiggs, June 15, 1820.*)

Chief Justice Fuller said, in *U. S. vs. Old Settlers, 148 U. S., 427:*

"There are many documents in the *Record* indicative of the view of the Indian office that the Western Cherokees were only a contingently separate community from the Eastern body and were subject to increase by the immigration of those East; and that they did not have, as an independant community, any ownership of the land, or rights therein, except what belonged to them in common with the whole Cherokee people."

So distinct were the two branches that in 1828 the Government concluded a treaty (*U. S. Stat. at Large, Vol. 7, page 311,*) with the chiefs and head men of the Cherokee Nation west of the Mississippi alone; yet the entirety of the nation was recognized in expressing that the purpose was to provide a home for the "whole Cherokee people," including those East as well as those West.

The nation east of the Mississippi, as we have seen above, adopted its own constitution in 1827, and considered themselves no part of their brethren. The treaty of 1833 was also concluded with the Cherokees west of the Mississippi, recognizing them as in

the other treaty—an independent sovereignty of themselves. During all this time the Government, influenced by the importunities of the states east of the Mississippi to extinguish the title of the Cherokees to their lands situated there, was endeavoring to unite the two nations west of the Mississippi.

Sundry expedients were resorted to, both by the general Government and by the authorities of Georgia, to compel the acquiescence of the Eastern Cherokees in the demand for their emigration. The Government was declining to recognize in the nation any rights of sovereignty, and was taking every means to disabuse the Eastern Cherokees of any pretentions to such rights. On May 17, 1834, John Ross and his delegation presented to Congress a memorial setting forth the injuries done them, and we find as one of the complaints the following:

"Heretofore until within the last four years, the money appropriated by Congress for annuities has been paid to the nation, by whom it was distributed and used for the benefit of the nation. And this method of payment was not only sanctioned by the usage of the Government of the United States, but was acceptable to the Cherokees. Yet, without any cause known to your memorialists, and contrary to their just expectations, the payment has been withheld for the period just mentioned, on the ground, then for the first time assumed, that the annuities were to be paid, not as hitherto, to the nation, but to the individual Cherokees, each his own small fraction, dividing the whole according to the members of the nation."

It will thus be seen that the Cherokees had at all times considered the rights of the Cherokees as national and its nation as a sovereignty. And the Supreme Court, contrary to the ideas of President Jackson and his advisers, upheld this contention, though not crrrying it to the extent contended for by the Cherokees.

Cherokee Nation vs. Georgia, 5 Pet., 1; 8 L. Ed., 25.

Holden vs. Joy, 17 Wall., 211; 21 L. Ed., 523.

Worcester vs. Georgia, 5 Pet., 515; 8 L. Ed., 483.

Finally, however, the treaty of 1835 (*U. S. Stat. at Large, Vol. 7, page 478,*) provided for the removal of the Cherokee Nation East to the West. And on the 4th day of December, 1838, the last detachment of them marched for the West. A number, however, said to exceed about one thousand scattered through the mountains of North Carolina and Tennessee to avoid removal.

Upon the coming together of the body of the nation in their new country west of the Mississippi, they found themselves torn and distracted by party dissensions and bitterness almost beyond hope of reconciliation. The parties were respectively denominated:

1. "The 'Old Settler' party, composed of the Cherokees who had prior to the treaty of 1835 voluntarily removed west of the Mississippi, and who were living under a regular established form of government of their own.

2. "The 'Treaty' or 'Ridge' party, being that portion of the nation led by John Ridge, and who encouraged and approved the negotiation of the treaty of 1835.

3. "The 'Government' or 'Ross' party, comprising numerically a large majority of the nation, who followed in the lead of John Ross, for many years the principal chief of the nation, and who had been consistently and bitterly hostile to the treaty of 1835 and to the surrender of their territorial rights east of the Mississippi."

Upon the arrival of the emigrants in their new home, the Ross party insisted upon the adoption of a new system of government and a code of laws for the whole nation. To this the Old Settler party objected, and were supported by the Ridge party, claiming that the government and laws already adopted and in force among the Old Settlers should continue to be binding until the general election should take place in the following October,

when the newly elected legislature could enact such changes as wisdom and good policy should dictate. A general council of the whole nation was, however, called to meet at the new council house at Takuttokah, having in view a unification of interests and pacification of all animosities. The council lasted from the 10th to the 22d of June, but resulted in no agreement. Some six thousand Cherokees were present.

A convention summoned by John Ross and composed of his followers together with such members of the treaty and Old Settler parties as could be induced to participate, convened and remained in session at Tahlequah from the 6th to the 10th of September, 1839. This body adopted a constitution for the Cherokee Nation, which was subsequently accepted and adopted by the Old Settlers or Western Cherokees in council at Fort Gibson on the 26th of the following June, and an act of union was entered into between the two parties on that date.

This state of affairs gave rise to the treaty of 1846, at the making of which were representatives of the Cherokee Nation (known respectively as the Government party, the Treaty party and the Old Settler party). (*U. S. Stat. at large, Vol. 9, p. 871.*)

In this treaty occurs again the expression, "The whole Cherokee people." We have seen that each of the factions claimed to be the nation, and each was contending for supremacy. We see further that their differences were to be settled by this treaty, and that it was admitted by all that the three factions should constitute, without question thereafter, one Cherokee Nation.

There were no representatives of those Cherokees who had elected to remain east of the Mississippi, and none were included except those who had a right to claim citizenship in the Cherokee

Nation and had never abandoned the same. As was said by Chief Justice Richardson in *20 Court of Claims, 478:* "The claimant relies much upon the language of the first article of the treaty of 1846, securing the lands west of the 'whole Cherokee people, for their common use and benefit,' as giving the North Carolina Cherokees and the claimant band an interest therein whenever any part should be sold. Even independently of the contemporaneous construction by all parties, which strengthens our views, we have no doubt that the 'whole Cherokee people' there referred to were the three parties into which the Cherokee Nation was then divided by dissensions, and not by locality—first, the 'Eastern Cherokees,' meaning those who removed West after the treaty of 1835-36, and who constituted the 'Government party'; second, the 'Treaty party,' and third, the 'Old Settlers,' all mentioned in that treaty."

Again he says on *page 482:* "By the Constitution of 1827, made at New Echota, where was signed the treaty of 1835, it was decided that 'the sovereignty and jurisdiction of this Government shall extend over the country within the boundaries above described, and the lands therein are, and shall remain, the common property of the nation; Provided, that whenever any of such citizen or citizens shall remove, with their effects, out of the limits of this nation, and become citizens of any other government, all their rights and privileges as citizens of this nation shall cease.' (*Laws, etc., p. 119*). Again in the act of union between the Eastern and Western Cherokees signed by the president of the Eastern Cherokees, the president of the Western Cherokees, and by delegates and officers of each division, July 12, 1859, 'it was declared that all rights and title to public Cherokee lands on the east or west of the river Mississippi, with all other public interests which may have been vested in either branch of the Cherokee family, whether inherited from our fathers or derived from other sources, shall henceforth vest entire and unimparied in the Cherokee Nation, as constituted by the union.' (*Same volume of laws, etc., A. D. 1852, part 2, p. 1.*)

"The constitution which followed the above declaration of union provides, in Article 1, Section 2; 'The lands of the Cherokee Nation shall remain common property. Whenever any citizen shall remove, with his effects, out of the limits of this nation, and become a citizen of any other government, all his rights and privileges as a citizen of this nation shall cease; Provided, neverthe-

less, that the national council shall have power to readmit, by law, to all the rights of citizenship, any person or persons who may, at any time, desire to return to the nation, on memorializing the national council for such readmission.'" (*Same volume, part 2, pp. 5, 6.*)

This question of citizenship has been considered a number of times recently by the Supreme Court, and the foreging and other provisions of the Cherokee constitution relative to citizenship have been construed and upheld. The case cited from the Court of Claims was confirmed by this Court in *117 U. S., p. 288*, wherein it was held that those Cherokees who refused to accompany the body of Cherokees on their removal West thereby dissolved their connection with the Cherokee Nation and lost their citizenship. It was decided that they lost it by virtue of the provisions in the Cherokee constitution above quoted, the Cherokee Nation being, as decided, a body-politic in which the rights accruing to its members were rights of citizenship alone. These laws were further construed in the *Cherokee Nation vs. Journeycake, 155 U. S., p. 196.* In this case Justice Brewer uses this language:

"But it must be borne in mind that the rights and interests which the native Cherokees had in the reservation and outlet sprang solely from citizenship in the Cherokee Nation, and that the grant of equal rights as members of the Cherokee Nation naturally carried with it the grant of all rights springing from citizenship."

A distinguished member of the local bar in orally discussing this question in the court below, stated with the pride of discovery that "the lands of the Cherokee Nation are held in joint tenants and coparcenaries with each other." Either he or Chief Justice Fuller is wrong, for the latter said, in *U. S. vs. Old Settlers, supra:* "The lands west of the Mississippi were held as communal property, not vested in the Cherokees as individuals, as tenants in common, or joint tenants."

The laws of citizenship in the Cherokee Nation have received another construction in a recent case of *Nofires vs. U. S., supra*, in which this Court recognizes and enforces them.

Among other things the Court says:

"Again, it is evident that Rutherford intended to change his nationality and become a Cherokee citizen. He took the steps which the statute prescribed and did, he supposed, all that was requisite therefor. He was marrying a Cherokee woman, and thus to a certain extent allying himself with the Cherokee Nation. He sought and obtained the license which was declared legally prerequisite to such marriage if he intended to become an adopted citizen of that nation. That he also obtained a marriage license from the United States authorities does not disprove this intention. It only shows that he did not intend that there should be any question anywhere, by any authority, as to the validity of his marriage. He asserted and was permitted to exercise the right of suffrage as a Cherokee citizen. Suppose, during his lifetime, the Cherokee Nation had asserted jurisdiction over him as an adopted citizen, would he not have been estopped from denying such citizenship? Has death changed the significance of his actions? The Cherokee Nation not only recognized the acts of young Dannenberg as the acts of the clerk, but since the death of Rutherford it has asserted its jurisdiction over the Cherokees who did the killing—a jurisdiction which is conditioned upon the fact that the party killed was a Cherokee citizen.

"It appears, therefore, that Rutherford sought to become a citizen, took all the steps he supposed necessary therefor, considered himself a citizen, and the Cherokee Nation in his lifetime recognized him as a citizen and still asserts his citizenship. Under those circumstances, we think it must be adjudged that he was a citizen by adoption, and consequently the jurisdiction over the offense charged herein is, by the laws of the United States and treaties with the Cherokee Nation, vested in the courts of the nation."

The Court not only uphold all the laws of the Cherokee Nation relating to citizenship and fully sustains its capacity to pass such laws, but further emphasizes the requirements under said laws, of permanent residence in the nation. The nation naturally passed such laws for self-preservation. We have seen in its history that its citizens had wandered off and formed themselves into

new bands, each claiming to be the rightfully constituted authority. The lands which were patented to them under the treaties are to revert to the United States if the Cherokee Nation becomes extinct or abandons the same. So, then, it was necessary to pass such laws as would best preserve its integrity and sovereignty. We have thus seen under the decisions of the Supreme Court of the United States that the public property of the Cherokee Nation is the same as similar property of any other nation.

Says Judge Field in *117 U. S., 288, supra*:

"The public property of a nation (referring to the Cherokee Nation) is supposed to be held for the common benefit of its people. Their individual interest is not separable."

Again, he says in the same case, in passing on the rights of those Cherokees who, under the Constitution and laws, had abandoned the nation:

"Their claim, however, rests upon no solid foundation. The land, from the sale of which the proceeds were derived, belonged to the Cherokee Nation as a political body, and not to its individual members."

The conclusion, therefore, is irresistable that those Cherokees who, at any time, have abandoned their tribal relation and have become citizens and residents of the United States or any other state, have lost all their rights of every kind in the Cherokee Nation, and can only regain them by the method hereinafter pointed out. Congress recognized this as true when, in *Section 43 of the Act of Congress of May 2, 1890*, enlarging the jurisdiction of the United States Court of the Indian Territory, it made provision for the naturalization by that court of any member of any tribe residing in the Indian Territory, as there was attached to that section the following:

"Provided, That the Indians who become citizens of the United States under the provisions of this Act do not forfeit or

lose any rights or privileges they enjoy, or are entitled to as members of the tribe or nation to which they belong."

In the Nofires case, above cited, the Court said that the citizen of the United States who became an adopted citizen by marriage to a Cherokee woman thereby changed his nationality.

VIII.

HOW CAN CITIZENSHIP BE REGAINED?

After this citizenship has been lost it can only be regained in accordance with the laws of the Cherokee Nation in such cases provided; which is by petitioning the council of the nation for readmission. Such was the decision in the case of the Eastern band of the Cherokees by the Court of Claims and the Supreme Court of the United States, *supra*, in which it was decided that such Cherokees "must comply with the constitution and laws of the Cherokee Nation and be readmitted to citizenship as there provided. They cannot live out of its territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the nation. Those funds and that property were dedicated by the constitution of the Cherokees and were intended, by the treaties of the United States, for the benefit of the united nation, and not in any respects for those who had separated from it and had become aliens to their nation."

The readmission by the council, of those who had forfeited citizenship, has always been a matter of grace on the part of the nation, and the various laws passed by the council delegating to courts and commissions its power to readmit to citizenship not only show this, but show that the Cherokee Nation never considered that because a man had Cherokee blood in his veins he could demand rights in the nation or exercise such rights unless

he was a recognized citizen of the same. After the nation moved West and occupied the country it at present occupies it became annoyed by a large class who claimed to be Cherokees by blood, and to have rights in the nation, but whose rights were disputed. Thus it was that the courts and commissions were empowered to try these cases and determine whether or not these claimants were citizens of the nation.

The jurisdiction originally conferred on them, we contend, was similar to that conferred upon the Dawes Commission, simply to determine the rights of, and enroll, such persons as were improperly denied the rights of citizenship, persons who had never forfeited their citizenship under the laws, but had done something to call their status in question. Later on such commissions were further empowered with the authority to readmit to citizenship. This, we respectfully submit, could not be legally done. We have seen by the decision above quoted that the courts of the United States construe the constitution of the Cherokee Nation as they construe the constitution of any state, and that the Cherokees themselves are as much bound by their organic law and can no more violate it, either through their legislature or otherwise, than the people of any state in this union can theirs. The constitution of the Cherokee Nation empowers the legislature to readmit to citizenship those who had abandoned the nation. That power rested alone with the council and could not be legally delegated to any court or commission.

Cooley on Con. Limitations, 6 Ed. pp. 137 and 146.

State vs. Field, 17 Mo., p. 529.

Dougherty vs. Austin, 29, Pac., 1092.

But if council did have this right, and any person applied to these various commissions and was denied citizenship, his case

must surely be tried here according to the law governing the commission to which he made his application, because it was under that invitation he came and applied. The first law which was passed in violation of such provisions of the constitution was as follows:

"*An Act Relating to Persons Returning to the Nation.*

"Be it enacted by the National Council: That all Cherokees, and other persons, having Cherokee privileges, who may have been residing out of the limits of the nation previously to the adoption of the constitution, are hereby exempted from being required to memorialize the National Council for admission to the rights and privileges of citizenship, it is considered that they have the right of returning without the action of the council.

"Tahlequah, October 15, 1841."

Here arose the intruder question in the Cherokee Nation, as will be seen by the following acts of the council:

"*An Act Relative to the Right of Citizenship.*

"Be it enacted by the National Council: That all persons whatever, residing within the limits of this nation, whose rights to the enjoyment and privileges of citizenship is doubtful or disputed, be, and they are hereby required to appear before the National Council at its annual session in 1844, to establish the same, or otherwise be subject to removal from the country as intruders.

"Tahlequah, January 10, 1844."

"*An Act to Amend an Act Relative to the Right of Citizenship Passed January 10, 1846.*

"Be it enacted by the National Council: That the President of the National Committee be, and he is hereby authorized and required to issue summons directed to the sheriffs of the several districts, requiring all persons now residing within the limits of this nation, whose rights to citizenship is doubtful or disputed, to appear before the National Council, on or before the first Monday in November next to establish the same, or otherwise be subject to a removal as intruders.

"Tahlequah, October 12, 1846."

"*An Act Relative to the Improvements of Rejected Citizens.*

"Whereas; The National Council passed a resolution requiring all persons residing within the limits of the Cherokee Nation, whose right to citizenship was disputed or doubtful, to appear brfore the National Council on or before the first Monday in November, 1846, then and there to establish their right to citizen-

ship, or otherwise be subject to removal as intruders; and several of such doubtful citizens having failed to establish their right to Cherokee citizenship; Therefore,

"Be it enacted by the National Council: That all the improvements owned and occupied by such citizens as have failed to establish their right, be and the same are hereby declared to be public property of the Cherokee Nation, and all persons are hereby prohibited from locating on or purchasing said improvements from such rejected citizens.

"Tahlequah, November 11, 1846."

This law of 1841 was repealed November 20, 1868, by the following Act:

"*An Act Repealing an Act Authorizing Persons to Move into the Cherokee Nation, Etc.*

"Be it enacted by the National Council: That the Act passed on the 15th of October, 1841, authorizing certain classes of persons to move into the Cherokee Nation without memoralizing the National Council be, and the same is hereby repealed.

"Approved November 20, 1868."

No person who applied before the commission, nor who have been bombarding the departments in years gone by, under claims of right to citizenship in the Cherokee Nation have claimed it under that Act. Therefore, it is of no importance in the consideration of these cases except to show the early violation of the Constitution by the council, and to show that the rights in the nation were at all times considered incident to citizenship.

On December 3, 1868, in an Act providing for the appointment of two persons as census takers, and requiring them to take a list also of all persons residing in the Cherokee Nation, not by law entitled to citizenship, the following provision was made for determining their rights:

"That all persons whose rights to citizenship in the Cherokee Nation shall be called in question and who shall be reported by the persons authorized by this Act to take a census of the Cherokee people, or list of doubtful persons, shall be required to appear before the Supreme Court of the Cherokee Nation, at Tahlequah, on the first Monday in December, 1870, then and there to establish their right to citizenship in the nation, and the said Supreme

Court is hereby specially empowered to act as a Court of Commissioners on behalf of the nation, for the hearing and determination of all cases of doubtful citizenship which shall be reported to them by the census takers, or by the solicitors of the several districts. And the decision of the said court shall be deemed final and conclusive in the premises as to the rights of said persons to citizenship in the Cherokee Nation. And the said court shall cause a correct list of the names and ages of all persons whose rights they may confirm; and one of all those whose rights they may reject, to be placed on record in their office and a copy of the same to be furnished to the Principal Chief for the use of the Executive Department.

"Approved December 3, 1869, the date of presentation."

A casual examination of this law will show that the court was not empowered to readmit persons to citizenship in the Cherokee Nation, but as we have before said, to determine whether such persons residing in the nation, and claiming to be citizens, were in fact such. And if such court went outside of this, and admitted persons to citizenship who had come from the adjoining states, and who, though they had Cherokee blood in their veins, had domicile in the surrounding states and were citizens of the same and had at no time been citizens, it exceeded its jurisdiction.

In 1869 the Secretary of the Interior addressed a letter to the Chief of the Cherokee Nation, advising him of the poverty and want existing among the Cherokees residing in the State of North Carolina, and asking if the nation could not make some provisions for their removal West, and incorporation in the body-politic of the Cherokee Nation. Prior to the sale of the Cherokee strip, it had all along been the policy of the nation to welcome the return and readmission of the Indians remaining East, hoping thereby to successfully check the encroachments of that steadily growing band of intruders; and to better, by the increase in the number of admitted Cherokees by blood, preserve its autonomy and perpetuate its peculiar institutions. So a joint resolution was passed

December 10, 1869, inviting them to emigrate West, and thereafter at the next council the following Act was passed:

"Whereas, The National Council, under a joint resolution approved December 10, 1869, entitled 'A joint resolution of the National Council in regard to the North Carolina Cherokees,' has invited the said North Carolina Cherokees to emigrate West, and become identified with the Cherokee Nation as citizens thereof; therefore,

"Be it enacted by the National Council; That all such Cherokees as may hereafter remove into the Cherokee Nation and permanently locate therein as citizens thereof, shall be deemed as Cherokee citizens; Provided, said Cherokees shall enroll themselves before the Chief Justice of the Supreme Court within two months after their arrival in the Cherokee Nation, and make satisfactory showing to him of their being Cherokees. And the said Chief Justice is hereby required to report the number, names, ages and sex of all persons admitted by him to be entitled to Cherokee citizenship; and also the number, names, ages and sex of the persons denied the right of citizenship, to the annual session of the National Council in each year.

"Tahlequah, Cherokee Nation, November 18, 1870, approved.

"LEWIS DOWNING,

"Principal Chief of the Cherokee Nation."

It is useless to say that no other persons except North Carolina Cherokees could come under the provision of the above Act. The discardal of technical requirements in their case was pardonable. The North Carolina Cherokees had kept up a sort of organization and a chief and other officers. They would come to the nation with proper certificates that they were Cherokees, and their identity could be easily proved. This power of enrolling these Cherokees was neither given to a court or commission, but the chief justice of the nation was made the enrolling officer. He was not acting in the capacity of a judge, because this he could not do alone, as the Supreme Court of the nation is composed of three judges, nor was he sitting in a judicial capacity at all, being a mere committee designated by the name of Chief Justice of the Supreme Court.

United States vs. Ferriera, 13 Howard, 52.

If, therefore, he enrolled any persons who were not North Carolina Cherokees, transcending his power, the enrollment was invalid and conferred no rights. The Chief Justice did transcend his power and enrolled people who were not North Carolina Cherokees, and in some instances upon evidence not considered very strong. So that the council in the following year amended the law as follows:

"*An Act to Amend an Act Approved November 18, 1870, Entitled 'An Act Relative to the North Carolina Cherokees.'*

"Be it enacted by the National Council: That the Act approved November 17, 1870, entitled 'An Act relative to the North Carolina Cherokees,' be and the same is hereby so amended as to require the Chief Justice of the Cherokee Nation to receive and hear the petitions of all persons claiming the rights of Cherokee citizenship, and to take evidence with regard to the same, and to transmit the petitions of such petitioners with all the evidence relating thereto, with such remarks touching the merits of each petitioner as he may deem proper, to the National Council during the first week of each regular session, for final action; nor shall the power of said Chief Justice extend any further, than to receive the petitions and take evidence as aforesaid. * * * He, the said Chief Justice, in acting in the premises aforesaid, shall be empowered and required to defend the interests of the Cherokee Nation, and in so doing, will be authorized to obtain all evidence possible to prevent the nation from any imposition, by any of such petitioners; and shall before entering upon the discharge of his duties aforesaid, take an oath to discharge the same faithfully.

"Be it further enacted: That for the purpose of executing this Act, said Chief Justice shall hold two sessions in each year, one during the month of April at Fort Gibson, and one at the town of Tahlequah in September, and he shall be allowed out of the general fund, while in actual service, $5.00 per day: and shall have the right of employing a clerk whose pay shall be $4.00 per day.

"Approved December 7, 1871."

Under this law he could recommend to council and submit the evidence council required. A number of cases are before the court under the foregoing laws. All of them were citizens of adjoining states, none of them claiming to have been previously recognized citizens of the Cherokee Nation or North Carolina Cherokees.

We, therefore, submit that even if council had the power to delegate to commissions the authority to readmit citizens it did not delegate the power to the Chief Justice or Supreme Court to admit persons of the class above mentioned. To show that the right to readmission has never been by the Cherokee Nation considered one to be demanded at any time and as a matter of right, by any person in whose veins coursed Cherokee Indian blood, we cite the following Act passed shortly after the operations which followed the enactment of the laws which we have cited above:

"Be it enacted by the National Council: That all these persons who have, by special Act, or otherwise been readmitted to the rights and privileges of Cherokee citizenship, and who shall fail to return to the nation within six months from the date hereof—and thereafter identify themselves with the people of the Cherokee Nation by locating permanently, shall be barred such rights of citizenship, all provisions to the contrary notwithstanding.

"Be it further enacted: That the Principal Chief cause this Act to be published in the Cherokee Advocate for six months from date of passage for the imformation of those concerned.

"Approved November 28, 1873."

This Act providing for the Chief Justice to take evidence in the case mentioned above was repealed December 5, 1876. We, therefore, see the North Carolina Cherokees are again shut out except by readmission by the council until further legislation. In the meantime, people are constantly coming from the states bordering on the Indian Territory and claiming rights in the nation. The Interior Department was flooded with appeals of rejected claimants, and both the United States and the Cherokee nation were endeavoring to devise some plan for the settlement of this vexatious problem. Upon the suggestion of the Interior Department, commissions were to be formed for the purpose. Carrying out this policy, a commission was provided, empowered with the following jurisdiction:

"The commission on citizenship shall have cognizance of, and

exercise complete jurisdiction over, all cases arising under the constitution and laws of the Cherokee Nation involving the right to citizenship of said nation as hereinafter specified.

"1st. Of all cases wherein claimant to citizenship has applied to the Supreme Court, or to the National Council, and wherein the court or council has failed to adjudicate the same, whether it originated in the National Council or was transmitted thereto for review from the Supreme Court.

"2nd. Of all cases where the National Council has adjudicated the same by a decision adverse to claimants and where such rejected claimants have appealed from the jurisdiction of the Cherokee Nation to that of the United States, subsequent to the date of the Cherokee treaty of July 19, 1866, and whose cases have been reported by the United States Agent under instructions from the Department of Interior to the Principal Chief and are now on file in this office.

"3rd. Of all cases where the claimants have ignored the authorities of the Cherokee Nation and appealed to those of the United States.

"4th. Of all cases where citizenship has been granted and there is presumptive evidence of fraud having been perpetrated to secure the same; or where citizens of the United States have married into this nation in violation of the law prohibiting the marriage of persons previously married without having obtained a divorce.

"5th. Of all cases of persons of African descent arising under the Cherokee treaty of July 19, 1866, where the applicant claims to have complied with the requirements of the treaty but has failed to receive recognition as a citizen by competent authority."

"In decreeing the right to citizenship in the Cherokee Nation the commission shall be governed by the provision contained in the *Fifth Section, Amendments to Article 3, of the Constitution*, to-wit: 'All native born Cherokees, all Indians and whites legally members of the nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners or by law, as well as free colored persons who were in the country at the commencement of the rebellion and are now residents therein, or who may return within six months from the 19th day of July, 1866, and their descendants, who reside within the limits of the Cherokee Nation, shall be taken and deemed to be citizens of the Cherokee Nation,' and in addition thereto shall include all applicants *bona fide* residents, and who are of Cherokee parentage, and who may be of not less than the half blood. The recognition of the right of citizenship in the Cherokee Nation, by virtue of the

foregoing provisions, shall not be deemed as conferring the like right upon any person not an Indian who may be connected by such person by blood or affinity, unless such person shall comply with the provisions of *Article 15, Chapter 10, New Code*, relating to intermarriages.

"The commission on citizenship may admit as evidence in any of the cases named herein the oral testimony of witnesses under oath, the decisions, records, or other papers, or the certified copies thereof in the clerk's office of the National Council, or of the Supreme Court of the Cherokee Nation, or other affidavits taken before any court of record in the United States, duly authenticated, pertaining to any case brought before it under this Act, and shall give such weight as to the credibility of such evidence in making up their judgments thereon as they may deem it entitled to. They may in their discretion limit the number of witnesses that may be introduced to establish the same fact in any one case, and fix the period for hearing and determining the same."

We have given jurisdiction, as we have said before, under the contention that if the claimant complained that he was entitled to citizenship under an Act because he applied under it and was wrongfully denied, he must bring himself, strictly within its provisions, for these commissions were appointed at the behest of the Government for their exclusive benefit.

As before stated, when these commissions were first instituted it was for the sole purpose of trying the rights of persons who claimed to be actual citizens of the nation, and were residents of the same. This is further shown by the following amendment to the Act creating the commission above mentioned:

"Be it enacted by the National Council: That an Act approved December 5, 1877, entitled 'An Act creating a commission on citizenship to try and settle claims to citizenship,' be, and the same is hereby amended so as to extend the jurisdiction of the commission on citizenship to embrace and extend to the cases of all claimants to the rights of citizenship, who may at the passage of the Act, be actually residing within the limits of the nation and whose cases have not heretofore been determined adversely to the claimants by the present commission.

"Sec. 2. Be it further enacted: That the Principal Chief be authorized and requested to direct the solicitors of the several

districts to report by the 1st day of January, 1879, or as soon thereafter as practicable, to the commission on citizenship, the names of all persons who allege that they have claims to Cherokee citizenship and who are now residing in their respective districts.

"Sec. 3. Be it further enacted: That the commission on citizenship shall expire on the 30th day of June, 1879, and shall then report their proceedings to the Principal Chief, for the information of the National Council, and shall turn over to the Executive Department all their records.

"Approved December 5, 1878."

The commission created above went out of existence by limitation and another was created November 20, 1879. Its jurisdiction was as follows:

"They shall also have the right to command the presence and services of the sheriff of Tahlequah District, or his deputy, during their sessions; who shall be allowed one dollar per day while attending the sessions of the commission on citizenship separate from his salary. The said sheriff shall have authority to send summons to the several sheriffs of the several districts to be served without delay by them, and returned, without any other compensation than that of their salaries.

"The commission on citizenship shall have cognizance of and exercise complete jurisdiction over all cases arising under the constitution and laws of the Cherokee Nation involving the right to citizenship of said nation as hereinafter specified.

"1st. Wherein a claimant to citizenship has applied to the late commission on citizenship and no final action taken, or to the National Council since the expiration of the commission on citizenship, or where application for citizenship may be made to the National Council prior to the first meeting of the commission on citizenship herein created.

"2nd. Of all cases where the National Council has adjudicated the same by a decision adverse to the claimants, and where said rejected claimants have appealed from the jurisdiction of the Cherokee Nation to that of the United States, subsequent to the date of the Cherokee treaty of July 19, 1866, and whose cases have been reported by the United States Agent under instructions from the Department of the Interior to the Principal Chief, and are now on file in this office, and which have not been investigated and final decision given by the late commission on citizenship.

"3rd. Of all cases where the claimants have ignored the authorities of the Cherokee Nation and appealed to those of the United States.

"4th. Of all cases where citizens of the United States have married into this nation in violation of the law prohibiting the marriage of persons previously married without having obtained a divorce.

"6th. Of all cases of claimants petitioning for citizenship not embraced in the foregoing classification of claimants.

"7th. Of all cases of persons of African descent, arising under the Cherokee treaty of July 19, 1866, where the applicant claims to have complied with the treaty, but failed to have received recognition as a citizen of competent authority.

"In decreeing the right to citizenship in the Cherokee Nation the commission shall be governed by the provisions contained in the 5th section, amendments to article 3rd of the constitution. The recognition of the right of citizenship in the Cherokee Nation, by virtue of the foregoing provisions, shall not be deemed as conferring the like right upon any person not an Indian who may be connected with such person by blood or affinity, unless such person shall comply with the provisions of *Article 15, Chapter 10, New Revised Code*, relating to intermarriage.

"The commission on citizenship may admit as evidence in any of the cases herein named the oral testimony of witnesses under oath, the decisions, records, or other papers, or certified copies thereof, in the clerk's office of the National Council or the Supreme Court of the Cherokee Nation, duly authenticated, pertaining to any case brought before it under this Act; and shall give such weight as to the credibility of such evidence, in making up their judgment thereon as they may deem it entitled to.

"They may, in their discretion, limit the number of witnesses that may be introduced to establish the same fact in any one case, and fix the period for hearing and determining the same."

The law providing for the aforesaid commission was repealed November 26, 1884, and on December 8, 1886, a third one was appointed, whose powers went further than those conferred on any of the others and encroached plainly upon the provisions of the constitution as to citizenship. Its jurisdiction was as follows:

"Sec. 7. The commission, when organized, shall give a hearing to any person applying for citizenship in the Cherokee Nation upon the ground of Cherokee blood or descent, but such applicant must be a person, or the lineal descendant of a person, whose name appears on the census rolls of the Cherokees taken by the United States after the treaty of 1835, and known as the rolls

of 1835, and the roll of 1848, known as the 'Mullay Rolls,' and the census rolls of the Cherokees taken by the United States in 1851, and known as the 'Sila Roll,' and the census rolls of the Cherokees taken by the United States in 1852, known as the 'Chapman Rolls,' and the commission shall decide in accordance with the constitution of the Cherokee Nation, conferring upon the National Council the power to readmit persons to citizenship, and with the opinion of the Supreme Court of the United States, delivered March 1, 1885, in the case of the *North Carolina Cherokees vs. the Cherokee Nation.*"

This jurisdiction embraces all sorts of Cherokees by blood except the "Old Settlers," who were provided for by an amendment May 23, 1887. The existence of this commission was extended by an Act of December 5, 1888, but mainly for the purpose of completing the unfinished work, and its power expired by limitation the second Monday in November, 1889. The Act, however, provided that the persons admitted by the commission should become *bona fide* residents of the nation within one year from the date of their admission.

On December, 1894, was passed the last Act of the Cherokee Council in regard to citizenship, and is as follows:

"Be it enacted by the National Council: That all persons who have been or may hereinafter be readmitted to citizenship in the Cherokee Nation, are hereby required to permanently locate within the limits of the Cherokee Nation within six months from the passage of this Act, or, from the date of readmission of persons hereafter readmitted, or no rights whatever shall accrue to such persons by reason of such readmission; Provided, that nothing in this Act shall bar minors and orphans.

"Approved December 4, 1894."

There are not a great many contested cases under these last Acts, and of course the main question in such cases is, did the applicants bring themselves within the jurisdiction of the commission and make proof of Cherokee blood required by the Act. It is contended by our adversaries that the decisions of such commissions admitting persons to citizenship are binding upon the nation

and are valid judgments in favor of the parties admitted. If their jurisdiction was properly conferred under the constitution of the Cherokee Nation, that is unquestionably true. No less, however, is the opposite true. If the judgment in their favor was valid and binding and not to be set aside except as other judgments of courts of record in the states are set aside, so must the judgment rendered against such applicants.

Some stress has been put on an opinion rendered by Attorney General Garland on the Act of 1870, with relation to North Carolina Cherokees in response to inquiries by the Secretary of the Interior relative to persons enrolled by the Chief Justice under that Act.

19 Opinions of Attorney Generals, p. 229.

His reply was in part as follows:

"In answer to the first question propounded, I beg leave to say that, a North Carolina Cherokee removed into the Cherokee Nation, as stated in such question, and who made proof, as therein named, was thereby fully invested with the rights, privileges and immunities of Cherokee citizenship. This was a species of naturlization resorted to by the legislature of the Cherokee Nation in 1870, and would stand to that extent, precisely as a judgment of a court under an Act of Congress conferring citizenship in the United States upon a foreigner or an alien, and closes all inquiry, and like every other judgment, is complete evidence of its own validity. (*Spratt vs. Spratt, 4 Pet., 406.*)

"Or to state it a little more broadly, a judgment in this proceeding by the Chief Justice of the Supreme Court of the Cherokee Nation was in the exercise of a special jurisdiction conferred upon him, and comes within that familiar rule, that when a special tribunal is authorized to hear and determine certain matters, its decisions within the scope of its authority are conclusive."

He further says in the course of his opinion, "that the proper construction of this Act is, that the judgment of the Chief Justice rendered according to the terms of such Act is the final determination and leaves nothing to review."

To this we heartily assent, but suppose the judgment was not rendered according to the terms of such Act, what binding force has it then? This opinion was asked as a matter of fact in the case of parties who not only themselves were never in the State of North Carolina, but whose ancestors were never there and who had resided for more than a generation, west of the Mississippi, and at that time apart from the Cherokee Nation, and as recognized citizens of the United States, and who were in fact admitted by the Supreme Court under the Act of 1869.

Mr. Garland, in his opinion, recognizes this well established principle of law, that there must be an end to litigation, and this wholesome rule applies to all decisions of those courts, as well those admitting persons as those denying them.

To show further that the Indians considered this matter of citizenship a right, which if lost, was to be gained only by readmission under the constitution, we here insert several Acts of the council admitting persons who had forfeited their citizenship. These were selected at random and hundreds similar to them could readily be furnished:

"*An Act to Readmit to Cherokee Citizenship Certain Persons Herein Named.*

"Be it enacted by the National Council: That Alexander Cochran and (his) wife, Annie Cochran, and their children, Jessie Cochran, Martin Cochran, Lizzie Cochran, Turner Cochran and Aggie, a stepdaughter of the aforesaid Alexander Cochran, he and they are hereby readmitted to all the rights and privileges of Cherokee citizenship.

"Approved November 27, 1879."

"*An Act Readmitting A. G. Greenway, a White Man, and His Two Children, Alonzo and Minnie Greenway, to Citizenship.*

"Be it enacted by the National Council: That A. G. Greenway, a white man, and his two children, Alonzo and Minnie Greenway, be and they are hereby readmitted to the rights and privileges of citizens of the Cherokee Nation; Provided, that the same rights and no other attach to A. G. Greenway than as an adopted citizen and (white) man in the Cherokee Nation.

"Approved November 29, 1878."

"*An Act Readmitting David N. Allen to the Rights of Citizenship.*

"Be it enacted by the National Council: That David N. Allen, Mary Allen and Joe Allen be and are hereby readmitted to all the rights and privileges of Cherokee citizens. (Concurred in by council with the following amendment:) Provided, that David N. Allen, the petitioner, shall not acquire any rights except such as attach to white men, adopted citizens of (the) Cherokee Nation.

"Approved December 3, 1878."

IX.

WHAT CLASS OF CASES THEN COULD THE COMMISSION LEGALLY CONSIDER?

In determining the meaning and intent of any law properly, we must necessarily consider the circumstances and conditions surrounding its passage. Who procured its passage, what evil it was intended to remedy, or what good to accomplish? The law creating the Dawes Commission was passed in the light of the decision in the case of the Eastern band of Cherokees, which decided that all Cherokees who had abandoned the nation under the provisions of its constitution were debarred from participation in the benefits of the treaties. We know that since that decision the department refused to consider the right to remain in the nation of any person who came in thereafter; and that, in considering the position of those who had come in previous, and who had *prima facie* certificates (hereafter explained), it was never claimed that the United States Government had the right to admit or readmit persons to Cherokee citizenship, but only to determine whether or not, upon application by the authorities of the Cherokee Nation, they could investigate the merits of the case, and determine for themselves whether or not the claimant should be removed by governmental authority under Sections 25 and 27 of the treaty of 1866. In other words, the Government maintained the right of determining whether he was a *bona fide* citizen, and

of not permitting such to be deprived of his rights, and not of admitting professed non-citizens to citizenship. It is now only exercising the same right maintained.

No persons outside of the Territory to speak of were seeking the aid of the department to gain citizenship for them.

It was an organized band of persons residing in the Cherokee Nation, which had grown to such proportions that they had organized an association under the title of "Cherokee Indian Citizenship Association." As an evidence of their contention as to who are entitled to the rights of citizenship, we quote below the language used by their president, W. J. Watts, in a little pamphlet compiled by him in 1895, with the intention, as he announced, "of placing before the public, facts as they exist in the Cherokee Nation in relation to citizenship since 1870." The quotation, we believe shows at least that he, presumably the exponent of the views of the association, did not contend that those who had abandoned the tribe and nation to become denizens of the states of the Union were eligible to the benefits accorded to *bona fide* citizens of the Cherokee Nation. We quote from page 142 of that pamphlet:

"This was the origin of the Eastern Cherokees, a term later dignified by the conferring of a corporate existence upon them by the State of North Carolina, and the ruling of the United States courts, that they were not eligible to benefits accruing to the main body of the tribe who had emigrated West. They were much scattered at that time and badly disheartened; but the census of 1890 shows that this branch of a great Indian tribe has certainly taken new life upon itself. Thrown upon their own resources, these Indians have developed a sturdy self-reliance entirely at variance with the accepted idea of the Indian, and are industrious, self-supporting, tax-paying citizens and voters. North Carolina claiming 1,520 of them, Georgia 936, Tennessee 318, and Alabama 111."

Congress certainly did not intend the commission to take the place of the National Council in naturalizing citizens. It certainly

never intended to reinstate the decendants of those who, by its solemn contract embodied in the treaty of 1835, it had disfranschised, and to trample upon the laws of the Cherokee Nation whose force and validity had been upheld by the highest court in the land. We submit, therefore, that their mission was to sit in judgment upon two classes of claimants, to-wit:

First: THOSE WHO CLAIMED THAT THEY NEVER HAD ABANDONED THE NATION AND HAVE ALWAYS BEEN CITIZENS UNDER THE TERMS OF THE CONSTITUTION.

Second: THOSE WHO CONTENDED THAT THEY HAD COMPLIED WITH THE LAWS AND CUSTOMS OF THE NATION IN SEEKING READMISSION AND (PARTICULARLY SO) IN APPLYING TO SOME ONE OF THE VARIOUS COMMISSIONS ON CITIZENSHIP WITHIN WHOSE RULES AND JURISDICTION THEY HAD BROUGHT THEMSELVES, AND HAD BEEN UNJUSTLY AND ILLEGALLY REJECTED AND DENIED READMISSION.

In support of these propositions we submit the following reasons:

(*a*) *Congress could confer no other jurisdiction on the commission without expressly repealing existing treaties.* Upon this point we quote in full the opinion of J. R. Hall, Assistant Attorney General, which gives the position that the Government held prior to what is known as the Strip Agreement, to which we will hereafter make more extended reference.

"Department of the Interior,
"Office of Assistant Attorney General,
"WASHINGTON, July 16, 1894.

"*John O. Cobb et al vs. The Cherokee Nation.* Alleged Cherokee Citizenship.

"The Secretary of the Interior:

"SIR: The claimants in this case are John O. Cobb, who married Eudora Moffet; S. H. Payne, who married Martha A. Moffet, and Dr. Moses Bell, who married Sarah Jane Moffet.

These men claim right to citizenship by reason of intermarriage with women of Cherokee blood.

"The three women named Eudora, Martha A. and Sarah Jane, were sisters and claimed to be Cherokees by blood. They were admitted to citizenship by the Supreme Court of the Cherokee Nation in 1870 and 1871. Afterwards it was determined by the Adair Commission that the decree of Supreme Court was obtained by fraud, and on December 7, 1877, the National Council passed an Act declaring these parties and their families to be intruders, and directing their removal.

"The parties entered what may be styled appeals to the department from this action of the Cherokee authorities.

"These several appeals have been submitted to me for examination and report as to the correctness of the findings of the Cherokee authorities whereby these appellants were declared to be intruders in the Cherokee Nation.

"Council for the Cherokee Nation insist that the Department of the Interior has no jurisdiction of this matter, and in support of that contention have filed an elaborate argument. They cite, first, the decision of the United States Supreme Court in *Volume 117, U. S., page 288*, known as the 'Cherokee Trust Funds Case,' in which the Supreme Court held that the Cherokee Nation had the exclusive right of determining the question of citizenship within the Cherokee Nation. Counsel also cite the first article of agreement made between the United States and the Cherokee Nation, dated December 19, 1891, and approved by Congress March 3, 1893, the first paragraph of which is as follows:

"First. That all persons now residents, or who may hereafter become residents, in the Cherokee Nation, and who are not recognized as citizens of the Cherokee Nation by the constituted authorities thereof, and who are not in the employment of citizens of the Cherokee Nation, in conformity with the laws thereof, or in the employment of the United States Government, and all citizens of the United States who are not resident in the Cherokee Nation under the provisions of treaty or Act of Congress, shall be deemed and held to be intruders and unauthorized persons within the intent and meaning of Section 6 of the treaty of 1835, and Sections 26 and 27 of the treaty of July 19, 1866, and shall, together with their personal effects, be removed without delay from the limits of said nation by the United States, as trespassers, upon the demand of the Principal Chief of the Cherokee Nation.'

"Prior to the approval of this agreement by Congress, the department had held uniformly that it had the power to look into the question of alleged citizenship in the Cherokee Nation, in order to determine whether persons alleged to be intruders by the

Cherokee Nation should or should not be forcibly ejected therefrom by the United States authorities. The department acted upon the opinion given by Mr. Attorney General Devens. (*16 Op., 404.*) That opinion was based upon the treaties of 1835 and 1866 between the United States and the Cherokee Nation. Those treaties obligated the United States Government to protect the Indians in the Cherokee Nation against intruders and to remove them therefrom.

"While the department recognized the right of the Cherokee Nation under these treaties to determine who were not citizens of that nation, yet, acting upon the opinion of Attorney General Devens, the department claimed the right to be satisfied that a person found to be an intruder by the authorities of the Cherokee Nation was in fact an intruder, before he would be forcibly ejected. This ruling was adopted and followed by the department, because neither the treaty of 1835 nor that of 1866 provided that the United States Government should accept as a final decision by the authorities of the Cherokee Nation on the question of citizenship, and act thereon on the demand of the constituted authorities of said nation. It will be seen, however, that the agreement of 1891, approved March 3rd, does provide that no one shall be a citizen of the Cherokee Nation unless he is recognized as such by the constituted authorities thereof, and that all persons not so recognized shall be deemed and held as intruders and shall, together with their personal effects, be removed without delay from the limits of said nation by the United States as trespassers upon the demand of the Principal Chief of the Cherokee Nation. Thus it will be seen, by the terms of this agreement, the Cherokee Nation is to be the sole judge of the right of any person to citizenship within that nation, and that when a person is declared not to be a citizen, but an intruder, he shall be ejected therefrom by the United States authorities on demand of the Principal Chief of the Cherokee Nation.

"Where it is claimed by one who is declared by the Cherokee Nation to be an intruder, that he falls within some one of the exceptions contained in the first paragraph or Article 2 above quoted, then it would be the duty of the department to inquire and determine whether or not such person comes within the exceptions found in said paragraph. The exceptions are as follows: 'Persons in the employment of the Cherokee Nation, or in the employment of citizens of the Cherokee Nation in conformity with the laws thereof, or in the employment of the United States government, or citizens of the United States who are resident in the Cherokee Nation under provisions of treaty or acts of Congress.' Where the claim of a person is simply that he is a citizen of the Cherokee Nation, and that question has been decided against him by the constituted authorities of said nation, then the depart-

ment has no right, in my opinion, to inquire into the correctness of the decision of that question, because the constituted authorities of the Cherokee Nation are to be the sole judges of such questions, and the plain and simple duty of the United States government is to remove such person as an intruder on demand of the Principal Chief of the Cherokee Nation.

"No one of the appellants in the cases now before me claims to come within either of the exceptions set forth in this paragraph of Article 2, but all claim to be 'citizens of the Cherokee Nation.' 'The constituted authorities' of the Cherokee Nation do not recognize their claim, and I advise that the department has no jurisdiction to inquire into the correctness or propriety of the determination made in these cases by the authorities of the Cherokee Nation.

"The papers submitted to me are herewith returned.

Very respectfully,
JOHN I. HALL,
Assistant Attorney General.

"Approved:
HOKE SMITH, Secretary."

T. J. Morgan, Commissioner of Indian Affairs, in discussing that same agreement in a letter to John W. Noble, Secretary of Interior, and refering to Articles 26 and 27 of the treaty of 1866, and more particularly to Article 5, of the treaty of 1835, gives the following as the law governing his department at that time:

"This provision operated as a guarantee of the right of self-government. One of the highest prerogatives of a government is the right to declare who are citizens, and the Supreme Court in the case of the Eastern band of Cherokees, etc., (*117 U. S. Reports, 288*), declared in effect that this right of self-government which has been secured to the Cherokee Nation gave that nation the right to determine who are entitled to citizenship therein.

"Since the conclusion of the treaty of 1835 it has been the clear obligation of the government of the United States to protect the Cherokees against 'interruptions or intrusions from all unauthorized citizens of the United States who may attempt to settle on their lands or reside in their territory.' This obligation was renewed in the treaty of 1866, and is binding to-day."

It seems that prior to the opinion of Attorney General Devens, referred to in Judge Hall's decision the Department of Justice held to the idea that the treaties with the Cherokees were

not with the authorities of the Cherokee Nation, but with the Cherokee people, by which the Government was bound in the execution thereof to see that every individual member of the tribe was fully protected in his rights, and that the Cherokees, wherever they resided, were to be regarded as Cherokee citizens with an indefeasible vested interest in the property and funds of that nation. But that opinion received a severe shock by the decision in *117 U. S., 288*, and though it had been considerably modified in 1879 by Attorney General Devens, who took the stand that the United States had no right to admit to citizenship, but claimed that the United States in putting out intruders would override the Cherokees to decide whether or not the person was an intruder. The following is a quotation from his opinion·

"That it is quite plain that in executing such treaties the United States are not bound to regard simply the Cherokee law and its construction by the council of the nation, but that any department required to remove alleged intruders must determine for itself under the general law of the land the existence and extent of the exegency upon which such requisition is founded."

After that opinion the agent of the five civilized tribes was instructed not to remove, as intruders, parties who claimed citizenship and produced *prima facie* evidence of their right to remain in the nation. The practical operation of that instruction was to retain in the nation any person who claimed, and could prove by any sort or shadow of evidence that he was a descendant of the Cherokees. The life of the instruction may best be seen in the following quotation from another letter from Commissioner Morgan to the Secretary of Interior relative to the Strip Agreement:

"By authority of this letter and of another of November 8, 1881, in which these instructions were substantially repeated, Agent Tufts instituted the practice of issuing certificates to all claimants to citizenship in the Cherokee Nation who could prove a *prima facie* just claim."

"In December, 1885, the Cherokee Council adopted an Act

'to create a joint commission on citizenship to try and settle the claims to Cherokee citizenship,' which authorized the appointment of two persons by the Principal Chief of the Cherokee Nation and one by the Secretary of the Interior, who were to constitute the said joint commission.

"This Act was, by a letter of February 1, 1886, from Principal Chief Bushyhead, submitted for the consideration and opinion of the department, he having withheld his approval of the same for the purpose of having it approved by the department before indorsing it; but, pending its consideration by this office, the Supreme Court of the United States rendered a decision in the 'Eastern band of the Cherokee Indians against the United States and the Cherokee Nation, (*117 U. S., 288*), in which it was held that 'if the Indians in that state (North Carolina), or in any other state east of the Mississippi, wish to enjoy the benefits of the common property of the Cherokee Nation, in whatever form it may exist, they must, as held by the Court of Claims, comply with the constitution and laws of the Cherokee Nation and be readmitted to citizenship as there provided.'

"It appears that after the decision of the Supreme Court in the case above referred to was rendered, Chief Bushyhead concluded not to approve the Act providing for a joint commission, but under date of April 3, 1886, addressed a letter to the department, requesting, among other things, that the right of the Cherokee Nation, under her constitution and laws, to determine who are and who are not citizens of said nation, be recognized, and that an order be issued revoking the instructions contained in letters of July 20, 1880, and November 8, 1881, to Agent Tufts, and forbidding the issuance of *prima facie* certificates thereafter.

"Since the conclusion of the treaty of 1835 it has been the clear obligation of the Government of the United States to protect the Cherokees against 'interruptions or intrusions from all unauthorized citizens of the United States who may attempt to settle on their lands or reside in their Territory.' This obligation was renewed in the treaty of 1866, and is binding to-day."

Assistant Attorney General George H. Shields, a lawyer well known and of high standing in our country, February 25, 1892, also addressed the Secretary of the Interior, an opinion in regard to the Strip Agreement, in which he says:

"Under the treaties the right of self-government has been guaranteed to the Cherokee Nation, provided they passed no laws in conflict with the constitution and laws of the United States. The Supreme Court of the United States has recognized this status

of the nation and decided in effect that no one is entitled to become a citizen thereof unless he complies with the constitution and laws of the nation and is admitted to citizenship thereunder. (*Eastern Cherokees vs. United States, 117 U. S., 288, 311.*)

"In these views the executive departments of the Government have concurred. But when demand has been made by the Cherokee authorities for the removal of those whom they asserted were intruders this department, whilst disclaiming the right to determine who shall become citizens of the Indian Nation, has insisted, under the advice of the Attorney General (*16 Ops., 404*), that it was incumbent upon the United States first to ascertain whether the alleged intruders were such in fact and in law. And if, upon investigation, it was found that those parties were, in the opinion of the United States authorities, entitled to citizenship, but had been unjustly deprived of or refused their rights, then to decline to remove them. Further than this, it has been insisted by the Indian office that, where it was determined parties were such intruders and ought to be removed, they should have ample time in which to garner or dispose of their crops and improvements upon the lands they occupied, and because the Indians were not willing to pay these parties what were considered proper prices for said improvements, bad faith was charged and the removals were not made. See letter of Commissioner of Indian Affairs, February 17, 1880, herewith.

"More might be said to show how it is that from one cause or another, rightfully or wrongfully, the treaty stipulations have not been carried out, but on the contrary, the Indians claim that the number of intruders have gradually increased, until their presence and arrogance has become intolerable to the Indians, a menace to their peace and prosperity, and a defiance to their laws and authorities."

Again, in the light of these views, commissioners on the part of the United States entered into an agreement for the sale and possession of certain lands belonging to the Cherokee Nation, and commonly known as the "Cherokee Strip." In the second article of that agreement was inserted the following provision:

"First. That all persons now resident, or who may hereafter become residents of the Cherokee Nation by the constituted authorities thereof, and who are not in the employment of the Cherokee Nation, or in the employment of citizens of the Cherokee Nation, in conformity with the laws thereof, or in the employment of the United States Government, and all citizens of the United States who are not resident in the Cherokee Nation under the

provisions of treaty or acts of Congress, shall be deemed and held to be intruders and unauthorized persons within the intent and meaning of section 6 of treaty of 1835, and sections 26 and 27 of the treaty of July 18, 1866, and shall, together with their personal effects, be removed without delay from the limits of said nation by the United States, as trespassers, upon the demand of the Principal Chief of the Cherokee Nation. In such removal no houses, barns, outbuildings, fences, orchards, growing crops, or other chattels real, being attached to the soil and belonging to the Cherokee Nation, the owner of the land, shall be removed, damaged, or destroyed, unless it shall become necessary in order to effect the removal of such intruders; Provided, That nothing in this section shall be construed as to affect in any manner the rights of any persons in the Cherokee Nation under the ninth article of the treaty of July 19, 1866."

Now, did the United States intend to violate the provision of that treaty in this matter? It is an elementary rule of construction that if a new law can be harmonized with those existing before its enactment it will be construed so as not invalidate either. In the new law it is expressly provided that said commission shall respect all laws of the several nations or tribes not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes.

(*b.*) *The history of claimant legislation shows that true.*

We have seen above that in the Strip Agreement the United States had promised to remove every person whom the Cherokee Nation should decide was not entitled to citizenship. Claimants, however, came in and said that certain of them, under *prima facie* certificates, had made large improvements in good faith prior to the decision of this court above mentioned. Owing to their importunities on that line, before the Strip Agreement was approved by the law March 3, 1894, this qualification touching the particular clause quoted above was inserted:

"And provided further; That before any intruder or unauthorized person occupying houses, lands or improvements which occupancy commenced before the 11th day of August, A. D. 1896,

shall be removed therefrom, upon the demand of the Principal Chief or otherwise, the value of his improvements, as the same shall be appraised by a board of three appraisers to be appointed by the President of the United States, one of the same upon the recommendation of the Principal Chief of the Cherokee Nation, for that purpose, shall be paid to him by the Cherokee Nation; and upon such payment such improvements shall become the property of the Cherokee Nation: Provided, that the amount so paid for said improvements shall not exceed the sum of $250,000."

This would seem to have settled the citizenship question in the Cherokee Nation for all time, that being apparently the principal thing contended for by the intruders. These were the parties who had been contending for their rights, and these were the ones that the agreement was endeavoring to protect as is shown again by the remarks of Commissioner Morgan, whose objection to the bill without such provision, was successfully urged. He says the "Cherokees have denied citizenship to these parties who appear to have accepted the invitations offered and entered the nation in good faith, believing they had rights there by blood, and who have always had in their power, by co-operation with this department, to determine the question of the intrusion of these claimants, and to secure the removal of all actual intruders from the nation, but who have uniformly and persistently declined to accept any plan for the settlement of the matter, which would not give the said authorities complete control of the question."

The only parties, therefore, according to the philanthropic views of that eminent divine, who needed protection, were protected. In executing that provision, however, a large number of those claimants refused absolutely to take pay for their improvements although appraised by the legally authorized appointees. They found 91 places aggregating in value $68,645.36. Of this sum $39,541.90 was accepted, while the sum of $29,103.46, al-

though tendered in legal money of the United States, was refused. The number thus refusing composed nearly 40 heads of families. This raised a new issue and Congress was beseiged by a strong lobby not to put these people out until their cases could be passed upon by some disinterested and impartial tribunal. They reiterated the plea urged in their behalf by Commissioner Morgan that they had come in good faith in compliance with invitations given by the constituted authorities of the Cherokee Nation. This was further backed up by instances of Cherokees by blood who claimed that they had never in their lives been outside the Cherokee Nation, but whose names had been dropped from the rolls, and others who claimed to have been lawfully admitted but had been denied their right.

We below give samples of such character of cases taken from pages 67 to 73, inclusive, of the little volume heretofore referred to, by W. J. Watts, the wily and resourceful President of the Cherokee Citizenship Association, which was printed in 1895, and strewn broadcast in the department and among the members of Congress in Washington prior to the passage of the Act creating the commission:

"*Case of Mrs. Rachel Edwards:*

"Cherokee Nation, Sequoyah District.

"On this day personally appeared before me, W. J. Watts, a Notary Public, in and for the Northern Division of the Indian Territory, Rachel Edwards, who on oath states:

"I am about 65 years old. My post office address is Muldrow, Indian Territory. I am a Cherokee woman. I was born in the old nation, East, and was moved in the Cherokee Nation by the United States Government in 1836, as well as I can remember. I have lived in this nation from that time to this date.

"My first husband was Moses Edwards, a prominent Cherokee citizen from which there was no issue, Edwards soon dying after the war. Some years later I was married to a United States citizen—a white man named Thompson. We couldn't get along peaceably together, hence I was divorced under the Cherokee law.

"My rights have never been brought in question until the census taker of my district reported me as being doubtful. Their plan of making Cherokees doubtful was to make a red mark opposite the name. This was in 1893.

"On September 5th, I made application to a merchant at Muldrow for credit on the strength of my strip money. The merchant, to satisfy himself of my being a legal Cherokee citizen, wrote to the Executive Department of the Cherokee Nation to ascertain the true facts and was furnished with the following certificate:

"'Executive Department, Cherokee Nation,
"'TAHLEQUAH, IND. TER., September 5, 1893.

"'I hereby certify that the name of Rachel Edwards, female, appears on the census rolls of 1880, Schedule I, census of Sequoyah District, Cherokee Nation, as a native Cherokee by blood. R. T. HANKS,

(Seal). Ass't Exec. Sec'y, Northern Div. Ind. Ter.
November 12, 1895.

"'I, W. J. Watts, Notary Public, within and for Muldrow, I. T., do certify that the above certificate is a true copy of the original, as is now in possession of Mrs. Rachel Edwards.

(Seal). W. J. WATTS, Notary Public.'

"On the assurance of the Strip money I secured credit of something over $100. When the Treasurer of the Cherokee Nation was paying the Cherokee *pro rata* share of the Strip money I applied for my money. Their excuse was that I was marked 'doubtful' and that I would have to appear before the Cherokee Council and be reinstated before I could get my Strip money. I went before the council in 1894. After pleading with the members to place my name on the property roll I was treated with contempt, and couldn't secure any action for or against my case. There are many others in the same condition to-day. I make this statement to show the injustice that is being done to citizens of the Cherokee Nation by people of their own blood.

"Gentlemen of the Dawes Commission: If within the scope of your authority, make such recommendations to the government of the United States as will correct this great wrong, which is being practiced by those in authority in the Cherokee Nation, your petitioner will ever pray.

Attest: T. F. ANDREWS,
RACHEL EDWARDS.

"Sworn and subscribed before me, W. J. Watts, Notary Public within and for Muldrow, Northern Division, Indian Territory, November 12, 1895.

W. J. WATTS, Notary Public."

"*Case of Mrs. E. M. Black:*

"MULDROW, I. T., December 1, 1895.

"To His Excellency, the President of the United State of America, Washington, D. C.:

"Permit me to say that I am a Cherokee woman, deriving my Cherokee blood from my grandmother, Cerena Sevier, a half-breed Cherokee, who married Andrew Culwell, a white man.

"My mother, Elizabeth Culwell, who was a daughter of said Andrew and Cerena Culwell, married John C. Jackson. I married William P. Black, September 1, 1867, in Hunt County, Texas. Since our marriage there have been five children born to us.

"We moved to the Cherokee Nation and filed my claim in compliance with the laws of the Cherokee Nation and myself and five children were readmitted to citizenship in the Cherokee Nation by the Adair court, which right we have enjoyed until we incurred the displeasure of some official."

CERTIFICATE OF ADMISSION TO CHEROKEE CITIZENSHIP.

"Office of Commission on Citizenship,

"Tahlequah, Cherokee Nation.

"To all whom it may concern—Greeting:

"This is to certify that the following named, to-wit: Eliza M. Black, and her five children, Dora L., Forrest C., J. Elliott, Kennie D., and Delia M., ages respectively, viz.: 44, 17, 11, 9, 8, 7, did, pursuant to the provisions of an Act of the National Council of the Cherokee Nation, approved December 8, 1886, entitled: 'An Act Providing for the Appointment of a Commission to Try and Determine Applications for Cherokee Citizenship,' make such application to and before said commission on the 20th day of September, 1887; that the proof submitted by the above named applicants in support of their said application has been heard and is hereby declared and certified to be sufficient and satisfactory to the said commission according to the requirements of Section 7 of said Act of the National Council, and that by virtue of such finding of fact by the commission, and in conformity with the fourteenth section of said Act, the above parties (applicants for citizenship) are from this date of said finding and decision of the said commission announced and recorded, readmitted by the National Council, as provided in said fourteenth section, to the rights and privileges of Citizenship, under Section 2, Article 1, of the Constitution of the Cherokee Nation; and this certificate of said decision of the commission and of readmission by council is made and furnished to the said parties accordingly.

"In witness whereof, I hereunto sign my name, as chairman of the commission, on this, the 22nd day of September, 1888.

J. T. ADAIR,

(Seal). Chairman Com. on Citizenship.

"Attest: CONNELL ROGERS,
Clerk Com. on Citizenship.
"Approved and endorsed, J. B. MAYES,
Principal Chief Cherokee Nation.
"HENRY EFFIERT,
Assist. Ex-Sec. Cherokee Nation."

SHIPPER'S PERMIT.

"Cherokee Nation, Cooweescoowee District,
Office of Clerk.

"WHEREAS, E. M. Black has petioned this office for a permit to ship prairie hay beyond the limits of the Cherokee Nation.

"Now therefore, I, A. H. Trott, Clerk of the Cooweescoowee District, Cherokee Nation, by virtue of authority in me by law, empower, authorize and permit E. M. Black, a citizen of the Cherokee Nation, to ship, transport or carry beyond the limits of the Cherokee Nation, prairie hay cut in Cooweescoowee District in the years 1891 and 1892. The said E. M. Black being subject to and required to comply with the conditions of the Act of the National Council, approved December 2, 1889, entitled, 'An Act to Protect the Public Domain, and for the purpose of revenue.'

"In testimony whereof I hereunto set my hand and affix the seal of my office on the 27th day of June, one thousand eight hundred and ninety-two.

H. H. TROTT,
Clerk Cooweescoowee District, Cherokee Nation.
By W. H. DREW, Deputy."

MONTHLY STATEMENT.

"Of prairie hay shipped or sold by..... of....., I. T., during the month of 189...., ...tons and.....lbs. subject to a tax of 20 cents per ton, amounting to.....dollars and.....cents.

"Sworn to and subscribed before me on this, the.....day of.....189....

.....
Clerk Cooweescoowee District, C. N."

"To H. Trott, Clerk Cooweescoowee District, C. N.:

"Received of E. M. Black $6.00 to apply on permit to employ David Belmire to labor as a farmer within this district for the term of 11 months from date, January 1, 1892; expires January 1, 1893.

F. METZNER,
Special Deputy Clerk, C. D., C. N."

It is useless to discuss these cases more than to say that Mrs. E. M. Black was before the court as an applicant, and the certificate of admission set out above is the boldest forgery that human eyes ever rested upon; she evidently purchased it from some per-

son who rightfully owned it, and scratched out the original names and inserted those of herself and descendants. The other was falsely personating a dead Cherokee woman of the same name.

It is true that Mrs. Black applied before one of the commissions in the Cherokee Nation about that time. Her case was fully considered, and a judgment rendered against her, all of which is of record in the Executive Department at Tahlequah and certified transcripts of it were placed before the Dawes Commission, who rejected her. She also appealed from their decision to the United States Court, which affirmed the decision of the Commission to the Five Civilized Tribes.

We know that the Government of the United States is preparing to allot the land among the citizens of the Cherokee Nation, and in pursuance of that avowed intention the commission was sent to the Indian Territory to make a correct roll of Cherokee *citizens*, these parties contending that the tribunals of the nations were unfair, partial and prejudiced, and that they had no way of establishing the fact that they were *bona fide* citizens.

Under the Act confirming the Strip Agreement the intruders were to be removed within a certain fixed time. Upon the plea of such as we have mentioned above, this was delayed from time to time upon various specious pretexts. The Government at length determined that it would fall back on its rights as formerly maintained under the opinion of Attorney General Devens, and send down a fair and impartial tribunal, one having no axe to grind in any nation, to determine whether or not those persons were, or ought legally to be considered, citizens of the Cherokee Nation.

Senator Platt, during the discussion in the Senate of the proposition to confer the power on the commission, said:

"We are told that we have nothing to say about who are citi-

zens there; that the 500 men who have thus usurped the power can decitizenize all the rest of the Indians, and we have nothing to say about it; that this Government has relinquished to the people who, through bribery and corruption and fear, control the tribes, to whoever may be in control the right to determine who are citizens there. If we have we had better regain it, and the more quickly the better, for the 500 people who own the land, who control the courts, who control the legislatures, will very soon be solving the question, if they have the unlimited power, by wiping off from the rolls of citizenship all the rest of the people there. The argument of the Senator from Wisconsin (Mr. Vilas) goes to that extent that whoever can control the courts and the legislature of those nations can determine the rights of the people claiming to be citizens, and it has been done.

"When the great payment of $6,000,000, which we gave for the Cherokee Outlet, was made, name after name of persons who had been upon the rolls as citizens was deliberately and corruptly wiped off in order that there might be a larger per capita distribution for the rest. Pitiable indeed is the condition of those Indians, for whom we are in honor bound to look out, if they are to be left to the tender mercies of those who control the courts and the legislature in those nations. No, Mr. President, there rests behind all treaties, there rests behind all statutes, there rests behind all decisions of the Court of Claims and of the Supreme Court the solemn obligation on the part of the Government to protect the Indians in the Indian Territory, and there is no protection possible for them unless we are to assume the right to determine who are the rightful citizens of the Territory."

The conclusion is, therefore, irresistible that the commission came to determine who among the Cherokees were to be put out of this nation as intruders instead of who on the outside should be put in as citizens.

(*c*) *The wording of the bill itself proves our contention.* It provides that "any person who shall claim to be added to said roll as a citizen of either of said tribes, and whose right thereto has either been denied or not acted upon, or any citizen who may, within three months from and after passage of this Act, desire such citizenship, may apply," etc.

(*d*) *The previously expressed opinions of the commission as*

at first constituted confirms it. It is an open secret that members of it were in Washington at the time the bill was before Congress, and that its provisions were largely dictated by them.

In an address sent out by them to the Five Civilized Tribes, February 12, 1894, in speaking of this vexed question, they made the following statement:

"Another question of great moment to the Indian is who is to decide what persons are entitled to allotment. There are many thousands who are claiming this right, and if Congress shall make provision by law to divide your land, it will also make provision for a tribunal to settle the question who are allottees, wholly independent of your tribal governments.

"Some among you claim that this right belongs exclusively to the different tribes, and that it has been so decided by the Supreme Court in the case of *Eastern Band of Cherokee Indians vs. United States, 117 U. S. Supreme Court Reports, page 880.* Upon examination it will be seen that the question there decided was, that as the Eastern Cherokees had abandoned their membership in the Cherokee Nation, and voluntarily ceased to be members of it, and become citizens of the United States, that they had lost all their tribal rights, which could not be restored except by the Cherokee Nation admitting them again to membership. But it is not there decided that the Cherokee Nation has the sole right to determine the question as to membership in the tribe of a person of Cherokee blood, who claims as a matter of fact that he has never abandoned membership in the tribe, and has not thereby lost his right to share in the lands and money of the tribe."

(*e*) *Justice and fair dealing exclude any other construction.*

IX.

COULD CONGRESS LEGALLY CONFER UPON THE DAWES COMMISSION ANY POWER TO CONSIDER THE QUESTION OF CITIZENSHIP IN THE CHEROKEE NATION?

We waive the discussion of the question as to whether or not Congress could confer judicial power upon a commission whose original duties were exclusively administrative, though we think the point well taken.

People vs. Chase, (Ill.) 36 L. Reps. Ann., 105.

Were we to do so and succeed upon this question alone, we would be left in the position of confessing that Congress might do rightfully what it had done wrongfully. If the Government has the power to create any commission to pass on questions of citizenship in the Cherokee Nation, it could not appoint one better fitted, more conscientious or painstaking than the one which has just about closed its labors. It would be remarkable if they have not made some mistakes for the nation as well as against it, so great was the task imposed upon them, and so short the time within which to execute it. The comparatively few cases appealed on either side evidences the esteem in which their decisions are generally held.

We have seen that the Attorney General for the Interior Department gave his opinion that the Supreme Court of the United States had held that the Cherokee Nation was the sole arbiter in the determination of questions of citizenship arising among its members. Other distinguished lawyers have held likewise. We know that a treaty is but a law and may be repealed as any other law—just that far and no farther. If the treaty gives a vested right, that right can no more be disturbed by the repeal of the treaty than a similar right created by any other law.

But the Strip Agreement has placed the Cherokee Nation upon even more solid ground than that. We have before seen that in that agreement one of the very considerations for the transfer was the guarantee of the right to the nation to determine for itself who were entitled to citizenship. It was more a consideration to the Cherokees than the actual money paid them. We are aware that there is nothing in the Constitution which forbids Congress from passing laws which impair the obligation of contracts. But it is further true that Congress has no power to pass

any law except in pursuance of some express power in the Constitution. And any law made otherwise which necessarily, and in its direct operation, impairs the obligation of contracts, is inconsistent with the spirit of the Constitution.

Davis vs. Gray, 83 U. S., 203; L. Ed., 457.
Hepburn vs. Griswold, 8 Wall., 603.
Mitchell vs. Clark, 110 U. S., 633.

Contracts, however, made by the Government itself stand upon a different footing, and the United States are as much bound by their contracts as individuals. They lay down their constitutional authority in such cases and have only the same rights, and are subject to same obligations as individuals.

Southern Pa. R. Co. vs. United States, 28 Ct. Cl., 77.
I. Story on Constitution, Sec. 1130.
Fowler vs. United States, 3 Ct. Cl., 43.
United States vs. Bostwick, 94 U. S., 53.

During the consideration of this question before the Senate, Senator Vilas made an unanswerable argument on this phase of the law, and though many speeches were made by Senators, not one attempted to reply to him. So conclusive is it of the question in hand, that we give an extended extract from it:

"Mr. President, a question has been raised as to what the law now is in regard to the right to determine citizenship in any one of the Five Civilized Tribes. The Senator from Connecticut (Mr. Platt) rather surprised me yesterday by saying that he did not recognize the right under the present state of treaty and law to exist in the several tribes themselves. It is enough for the purpose of showing that the amendment, were it enacted into law, would revolutionize the present treaty condition, to show that one of those people, the Cherokee people, is now protected, beyond the least question or doubt, by the most explicit stipulations. I should like to correct, if I am right, and if the statement was

somewhat erroneous which the Senator from Arkansas made, that view of it which he submitted. The question did not become important under the treaties which established autonomous government of those civilized tribes for a long time after those treaties were made.

"The treaty of 1835, by which the Cherokee Nation was established, or by which the former treaty made with them in 1829, was given its durable form, provided explicitly that the Cherokees on their part should endeavor to preserve and maintain the peace of the country and not to make war upon others, while in consideration of that it was added immediately:

"'They shall also be protected against interruption and intrusion from citizens of the United States who may attempt to settle in the country without their consent.'

"That was the origin of the intruder question and of the difficulties which have arisen in respect to the subject. That was practically reaffirmed in the treaty of 1866, and there was little need for a considerable time for enforcement of that agreement on the part of the United States. Little or no claim was made by either of the nations or by the Cherokees until the settlement of the West began to expose their borders to intrusion from lawless persons, individuals who disregarded every sort of right and every sort of obligation which the United States had imposed upon their citizens. It happened at last that one of those nations claimed the exercise on the part of the United States of this guaranty to protect them from intrusion. Then Attorney General Devens gave it as an opinion that the United States were at liberty to decide, when asked to expel an intruder, whether or not the person was an intruder, whether or not he could be regarded by the constituted authorities of this government as entitled to participate in their citizenship or to remain in their country. After that opinion was announced, the Supreme Court, in the case to which I referred yesterday, which is known as the Cherokee Trust Fund case, arising out of claims of the Eastern Cherokees to participate in the funds of the nation, etc., decided as stated in the first headnote of that case, that—

"'By treaties with the Cherokees the United States have recognized them as a distinct political community, so far independent as to justify and require negotiations with them in that character.'"

There followed in the discussion of that case the further question of the right of the Eastern Cherokees to participate as citizens in the funds and property of the Cherokee Nation domiciled and settled in the Indian Territory, and to which as a nation

a patent had granted the right of ownership of their lands in common, upon whatever implied trust need not be discussed. The Supreme Court said then, that—

"'The claim presented by the Cherokees of North Carolina, to a share of the commuted annuity fund of $214,000, and of the fund created by sales of lands west of the Mississippi ceded to the Cherokee Nation, resting as it does upon the designation in the treaties of the lands originally possessed by the Cherokees and ceded to the United States, or subsequently acquired by them from the United States as 'the common property of the nation,' or as he held for the 'common use and benefit' of the Cherokee people, has no substantial foundation.'"

"Then follows what they add as the reason for that:

"'If the Indians in that state, or in any other state east of the Mississippi, wish to enjoy the benefits of the common property of the Cherokee Nation, in whatever form it may exist, they must, as held by the Court of Claims, comply with the Constitution and laws of the Cherokee Nation, and be readmitted to citizenship as there provided.'

"In other words, the Supreme Court of the United States declared, what to a lawyer was obvious without that declaration, it seems to me, that the Constitution and laws of that independent and political community were the sole touchstone of the right to citizenship within that community. After that decision, which was made subsequent, indeed, to the ruling of Attorney General Devens, the case was heard at the October term, 1885. After that decision, the Department of the Interior always regarded that the right to decide upon the status of a claimant to citizenship in one of those Five Civilized Tribes was exclusively vested in the lawful authority of the tribes, to be determined by the Constitution and the laws of the tribes. That decision was made by the honorable Senator from Colorado (Mr. Teller) a little before, even, when he was Secretary of the Interior. It was afterwards followed by others in that office, and I myself had occasion, when occupying that office, to render a similar decision, although I insisted that when a person had been allowed to enter the lands of a tribe and remain there for years while the question of citizenship was depending undetermined by its authorities, if they suffered him so to delay, and while delaying to accumulate property and interests, that there remained in him a right which the Government should protect, however tenuous that right was; that a final decision of the question against his claim of citizenship should be accompanied with sufficient accord to him of privilege to dispose of his property without taking it from him."

Mr. George: "Still their decision would be final."

Mr. Vilas: "Their decision was so recognized in the department in a case to which I refer — the Kusterman case. The fact that they had found him to be no citizen was considered as controlling the department upon that point. That has been ever since the ruling of the department, as I understand it."

"But a few years ago Congress established a commission to deal with this same nation for the extinguishment of the title, whatever it was, whether to use or otherwise of a large body of land, exceeding 6,000,000 acres in quantity, called the Cherokee Strip."

Mr. Jones of Arkansas: "The Cherokee Outlet."

Mr. Vilas: "The Cherokee Outlet, sometimes called the Cherokee Strip. That commission made a bargain with those Indians by which after long resistance on their part, and great reluctance to part with their title, they did finally agree to transfer it to the United States upon certain considerations. One was a consideration of money, but others upon which they insisted with the greatest pertinacity were considerations of another character. They were left with their orignal patented lands in their possession, but for the protection of their government and exclusive enjoyment of those patented lands they made this stipulation in the treaty then agreed to ——"

Mr. George: "Concerning the Outlet?"

Mr. Vilas: "Concerning the Outlet."

"'For and in consideration of the above cession and relinquishment, (begins Article 2, the cession being made in Article 1) the United States agrees:

"'First: That all persons now resident, or who may hereafter be come residents, in the Cherokee Nation, and who are not recognized as citizens of the Cherokee Nation by the constituted authorities thereof,——'"

Mr. Jones of Arkansas: "That has no relation to citizenship. That was the question about intruders."

Mr. Vilas: "I will repeat that, in order to answer by its own terms the suggestion of the Senator from Arkansas, which I think was rather hastily made:

"'For and in consideration of the above cession and relinquishment, the United States agrees:

"'First: That all persons now resident, or who may hereafter become residents, in the Cherokee Nation, and who are not recognized as citizens of the Cherokee Nation, by the constituted

authorities thereof, and who are not in the employment of the Cherokee Nation or in the employment of citizens of the Cherokee Nation, in conformity with the laws thereof, or in the employment of the United States Government, and all citizens of the United States who are not resident in the Cherokee Nation under the provisions of treaty or acts of Congress, shall be deemed and held to be intruders and unauthorized persons within the intent and meaning of Section 6 of the Treaty of 1835, and Sections 26 and 27 of the Treaty of July 19, 1866, and shall, together with their personal effects, be removed without delay from the limits of said nation by the United States, as tresspassers, upon the demand of the Principal Chief of the Cherokee Nation.' "

Mr. George: "What is the date of that agreement?"

Mr. Vilas: "I will give it. That agreement was signed by the commissioners at Tahlequah, in the Indian Territory, on the 19th day of December, 1891, and was approved by the law of March 3, 1893, with this qualification touching the particular clause in question:

"'Amend the same by adding to the first paragraph of Article 2 of said agreement the following words: And Provided further: That before any intruder or unauthorized person occupying houses, lands or improvements, which occupancy commenced before the 11th day of August, A. D. 1886, shall be removed therefrom, upon the demand of the Principal Chief or otherwise, the value of his imprevoments, as the same shall be appraised by a board of appraisers to be appointed by the President of the United States, one of the same upon the recommendation of the Principal Chief of the Cherokee Nation, for that purpose, shall be paid to him by the Cherokee Nation; and upon such payment such improvements shall become the property of the Cherokee Nation: Provided, That the amount so paid for said improvements shall not exceed the sum of $250,000: And Provided further, That the appraisers in determining the value of such improvements may consider the value of the use and occupation of the land.'

"In other words, Mr. President, by the Act of Congress confirming and sealing that contract, by which we purchased the Cherokee Outlet, we agreed that they should be considered as intruders whom that nation did not recognize as citizens, with the exception of those particular cases specially named.

"I think that argument leaves no sort of question of the proposition that the right to determine the citizenship of the several nations, certainly of the Cherokees, is as solemnly vested by contract and by statute in the nation itself as it is possible for the Congress of the United States to accomplish it.

"The question then is presented whether by an amendment thrust in upon this appropriation bill we shall trample down, hardly more than three years after, that agreement upon which we obtained their lands, that right which we then declared to be theirs and covenanted to respect."

In the court below, before any opinions were delivered in citizenship cases opportunity was afforded the representatives of all sides of the cases to be heard on the general principles which should govern the court in its decision. The Hon. Wm. M. Springer, Judge of the Northern District of the Indian Territory, after the conclusion of these arguments rendered a general decision which would govern him in disposing of every case. This was an able and exhaustive decision and from it we make the following extracts:

"In the opinion of this Court the following propositions are clearly established by the decision of the Supreme Court of the United States and the United States Court of Claims in the case of *The Eastern Band of Cherokees against The Cherokee Nation and the United States*, viz:

"First: That the lands and other property of the Cherokee Nation belong to it as a political body and not to its individual members. The lands are held as communal property not vested in the Cherokees as individuals, either as tenants in common or joint tenants. (See also opinion by Chief Justice Fuller of the Supreme Court in the case of *The United States against The Old Settlers, 148 U. S., 427.*)

"Second: That the North Carolina Cherokees, who are now known as the Eastern Band, who refused to join their countrymen in the removal to the lands ceded to the Cherokee Nation west of the Mississippi river, thereby dissolved their connection with what is now known as the Cherokee Nation. They became citizens of the states and subject to the laws of the states in which they resided, and have no right, title or interest in the lands or other property of the Cherokee Nation as now constituted.

"They have received either their due proportion of all the personal benefits accruing under the treaty of 1835-6, for their claims, improvements and per capita. Since their separation from the Cherokee Nation they have had no right to any portion of the lands or common property of the nation, or to any lands or

property held for the common use and benefit of the Cherokee people who constitute said nation.

"Third: That the phrase, 'the whole Cherokee people' used in the treaty of 1846, refers to those Cherokees only whose representatives participated in the making and ratification of the treaty, viz: The Cherokee Nation proper, the treaty party and the old settlers or Western Cherokees. Those Cherokees only were the recognized citizens of the United Cherokee Nation, and no other Cherokees were entitled to the rights and privileges of citizens of the Cherokee Nation, as now constituted.

"Fourth: If the Eastern band of Cherokees, or the Cherokees in all the states of the Union wish to enjoy the benefits of the common property of the Cherokee Nation, in whatever form it may exist, they must, as held by the Supreme Court, and by the Court of Claims, comply with the constitution and laws of the Cherokee Nation and be readmitted to citizenship as therein provided. They cannot live out of its Territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the lands, funds and common property of the nation. These lands, funds and property were dedicated by the Cherokee constitution, and were intended by the treaties with the United States for the use and benefit of the United Nation, and not in any respect for the use and benefit of those who have separated themselves from it and become aliens to the nation.

THE LAND TENURE.

"The Constitution of the Cherokee Nation, Article 1, Section 2, provides that the lands of the Cherokee Nation shall remain common property, but the improvements made thereon, and in possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made, or may be rightfully in possession of them.

"The patent of the United States to the Cherokee Nation, issued on the 31st day of December, 1838, provides as follows:

"'Therefore, in the execution of the agreements and stipulations contained in the said several treaties, the United States have given and granted, unto the said Cherokee Nation the two tracts of land so surveyed, and hereinbefore described, contained in the whole 14,374,135 and 14-100 of an acre, to have and to hold the same together with all the rights, privileges and appurtenances thereto belonging to the said Cherokee Nation forever; subject, however, to the right of the United States to permit other tribes of Red Men to get salt on the salt plains of the Western prairie, referred to in the second article of the treaty of the 29th of December, 1835, etc.'

"And subject, among other things, to the further condition, 'That the lands hereby granted shall revert to the United States if the said Cherokee Nation becomes extinct or abandons the same.'

"It will be seen from the text of the patent by which the Cherokee Nation holds the lands belonging to it, that the title is in fee simple with certain conditions, called a base or qualified fee. The citizens who occupy the lands of the Cherokee Nation have no title to the soil, but merely a right to occupy such portions of the soil as they may cultivate, under the laws of the nation. The citizen occupant not having any title to the land, but owning the improvements only, cannot be said to be, either a tenant in common or a joint tenant, with any other citizen of the nation, because such tenure implies title of some kind in the tenant. Tenants in common have a unity of possession because no man can tell which part is his own. (*Browne's Blackstone's Commentaries, page 263.*)

"Hence the possession of one citizen of a portion of the land of the nation is in no sense a tenancy in common. Nor are the citizens of the nations joint tenants, for joint tenants of land hold in fee simple or otherwise, and there must be a unity of interest, a unity of title, a unity of time, and a unity of possession. In other words the joint tenants have one and the same interest secured by one and the same conveyance, commencing at one and the same time and held as one individual possession. (*1 B., 256.*)

"These definitions, therefore, do not apply to any condition existing in the Cherokee Nation as to land tenure and occupancy. A citizen of the Cherokee Nation has the exclusive right to the occupancy of the land upon which he has made improvements, or of which he is rightfully in possession. No other citizen of the nation has any right to occupy the particular tract occupied by another citizen; therefore, the citizens of the nation are neither joint tenants with other citizens of the nation or tenants in common. They occupy the lands in severalty. Each holding the possession in own right only, without any other person being joined or connected with him in point of interest during his occupancy. They are merely occupants in severalty.

THE UNITED NATION.

"The Indians who by the treaty of 1835 agreed with the United States to emigrate west of the Mississippi river, were finally located in what is now known as the Cherokee Nation. The Western Cherokees, known as the old settlers, had preceded them to this country. A new nation was formed to consist of the Eastern and Western Cherokees. This act of union between the

Eastern and Western Cherokees was agreed to on the 12th day of July, 1838. In September following, as heretofore set forth in the opinion of the Supreme Court, a constitutional government was adopted in which it was recited that the Eastern and Western Cherokees had become united in one body politic under the style and title of the Cherokee Nation. Notwithstanding the formation of this union and the establishment of a new constitution and a new nation, all was not peace and harmony. Dissention arose which led to the formation of the treaty of 1846. This treaty was made and concluded between the following parties:

"First.—The United States.

"Second.—The Cherokee Nation.

"Third.—The Treaty party, which was a faction of the Cherokee tribe of Indians at that time.

"Fourth.—By the Old Settlers or Western Cherokees.

"This treaty recites the fact that serious difficulties for a considerable time past had existed between the different portions of the people constituting and recognized as the Cherokee Nation of Indians, which it was desirable should be speedily settled so that peace and harmony might be restored among them. With a view to final and amicable settlement of these difficulties that treaty was agreed to.

"The first article provides, among other things, that 'the lands now occupied by the Cherokee Nation shall be secured to the whole people for their common use and benefit.'

"The words, 'the whole Cherokee people' mentioned in this article evidently refer to the parties who participated in the formation of the treaty, and, as Chief Justice Richardson held in his opinion, to which reference is made, these words did not embrace what is known as the Eastern band of Cherokees. Nor do they embrace the Cherokees who have separated themselves from the tribe and taken up their residence in the states.

THREE CLASSES OF CHEROKEES.

"From these treaties and from provisions in the Cherokee constitutions it will be seen that there were, and have been since the establishment of the present Cherokee Nation west of the Mississippi River, three classes of Cherokee Indians.

"First: Those who were citizens of the United Cherokee Nation, the nation as now constituted, and which occupies the lands ceded to the nation west of the Mississippi River.

"Second: The Eastern Band of Cherokees which constitutes all those individuals and families of the old Cherokee Nation, who were averse to the removal of the Cherokee country west of the

Mississippi River, and who were desirous to become citizens of the states in which they lived, and where they then resided

"Third: Those Cherokees, mentioned in the Constitution of the United Cherokee Nation, and also in the Constitution of the old Cherokee Nation, who were described as follows: 'Citizens who shall remove with their effects out of the limits of this nation and become citizens of another government.' Such Indians were declared by the Cherokee Constitution to have forfeited all their rights and privileges as a citizen of the nation. It was provided, however, with reference to this latter or third class, 'that the National Council shall have power to readmit by law to all the rights of citizenship any such person or persons who may at any time desire to return to the nation on their memorializing the National Council for such readmission.'

"Those who are now claiming the right to be enrolled as citisens of the Cherokee Nation come within one or the other of the last two classes mentioned.

WHO MAY BE ADMITTED TO CITIZENSHIP.

"This court has no jurisdiction or power under the Acts of Congress by means of which the pending cases are being considered to exercise and discretion as to who should or who should not be enrolled as citizens of the Cherokee Nation. It has the power simply to determine who are legally citizens thereof, and who ought to be so regarded, but who are now denied the rights and privileges of citizenship by said nation. The law of Congress conferring jurisdiction on this court to consider these cases, provides that the United States Commission 'shall respect all laws of the several nations or tribes not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages and customs of each of said nations or tribes.'

"While no rule of decision is laid down in the Act of Congress for this court, it will be assumed that the same provisions of law apply to this court that were made applicable to the United States Commission. The direction is to 'respect' all laws of thes everal nations. What is meant by the word 'respect' as used in this connection? There can be but one meaning, and that is that the court and the United States Commission should give effect to all such laws. The next phrase in the Statute is as follows: 'And all treaties with either of said nation or tribes.' The word 'respect,' therefore, applies equally to the treaties as to the laws. The next phrase is as follows: 'And shall give due force and effect to the rolls, usages and customs of each of said nations or tribes.'

"This court must, therefore, respect or give effect to all laws of the several nations, not inconsistent with the laws of the United States, and must give effect to all treaties with either of said nations, and must give due force and effect to the rolls, usages and customs of each of said nations or tribes. In this last provision Congress has recognized the fact that the Cherokee Nation has a right to determine who shall be and who shall not be citizens of the nation. The National Council may, in its discretion, confer citizenship upon any person, or it may establish courts of commissions to hear and determine applications for citizenship in the nation. In determining, therefore, who among those now claiming citizenship should be enrolled as citizens of the Cherokee Nation, this court will look to the laws of the nation and consider whether these laws are in conflect with the laws of the United States. It will also ascertain who have been lawfully adjudged to be citzens by tribunals or commissions duly authorized to pass upon their applications. And it will consider the treaties that have been made between the United States and the nation, and it will give due force and effect to the rolls, usages and customs of the nation in dealing with citizenship cases.

"In order to determine what is the law of the Cherokee Nation, the same rules of construction must be applied as would be applied to the laws of Congress or of any state in this Union. If the law should be found to be in conflict with the Constitution of the Cherokee Nation it would be null and void, just as the law of Congress in conflict with the Constitution of the United States would be null and void.

"In considering the treaties which have been made between the Nation and the United States, they must be carried into effect and the true intent and meaning of them must govern. If it should appear that any of the treaties had been abrogated by Congress such treaties would no longer be in force.

"In order to give due force and effect to the rolls, usages and customs of the nation this court will inquire into such rolls, usages and customs. Congress has already defined what is meant in the Act of June 10, 1896, by the words, 'rolls of citizenship.' The rolls of citizenship as defined by Congress have been confirmed. The Amendment Act which is found in the Indian Appropriation bill passed June 7, 1897, is as follows:

"'Provided, That the words, 'roll of citizenship,' as used in the Act of June tenth, eighteen hundred and ninety-six, making appropriations for current and contingent expenses of the department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the

nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly authorized courts thereof, or the commission under the Act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to investigation by such commission for a period of six months after the passage of this Act. And any name appearing on such rolls and not confirmed by the Act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such commission where the party affected shall have ten days previous notice that said commission will investigate and determine the right of such party to remain upon such roll as a citizen of such nation: Provided, also, That anyone whose name shall be stricken from the roll by such commission shall have the right of appeal, as provided in the Act of June tenth, eighteen and ninety-six.'

"This provision of course will take effect from the date of its passage, and this court will give such construction to the words, "rolls of citizenship," used in the Act of June 10, 1896, as is provided for in this amendment.

"It is competent for Congress by subsequent Acts to declare the meaning which should be given to Acts previously passed, and this court will carry into effect the meaning which Congress subsequently provided should be given. * * *

ADJUDICATION IN CITIZENSHIP CASES.

"In all cases wherein it appears that applicants for citizenship in the Cherokee Nation filed their claims before the proper tribunal or commission, and in all cases where the tribunal or commission acted within the scope of its jurisdiction, as prescribed by the law of the Cherokee Nation, and admitted such persons to citizenship, this court will regard such cases as adjudicated; and in all cases where such applicants were rejected, the same rule will be applied. In order to set aside such adjudications, whether in favor of or against such applicants, it must be made to appear to this court, either that the tribunal or commission acted without jurisdiction, or that the decision of the commission was procured by fraud. 'A judgment by which the court exercised a power not conferred upon it by the Statute under which it assumed to act is a nullity and will be so treated when it comes in question, either directly or by appeal or collaterally.'

Allison vs. T. A. Snider Preserve Co., (Sup. Ct. App. Term.,) 20 Misc. 367.
45 N. Y. Sup., 925.
Risley vs. Bank, 83 N. Y., 318.

"In order that the adjudication of the tribunal or commission should be set aside for fraud, it must clearly and affirmatively appear that the case was fictitious; that the judgment of the tribunal was procured by the beneficiaries thereof by bribery or other corrupt means, and that the judgment should not in equity and good conscience be regarded as a valid judgment.

"Justice requires that every case, having been once fairly and impartially tried, should be forever closed, and public tranquility demands that all litigations of that kind between those parties should cease. A judgment entitled to this consideration must, however, be the judgment of the tribunal.

"'The rule is well settled that a judgment or decree of any court will be set aside in a court of equity if it be made to appear that it was procured by fraud. This rule needs no citation of authorities to support it, because it is too well established and known to need such citation. But the proof of the fraud and the facts evidencing it must be clear and satisfactory to the court before it will act. It will not proceed upon doubtful inferences.'

Davis against Jackson, 39 S. W. Rep., p. 1076.
(Supt. Ct. of Tenn., March 13, 1897.)

"It is not enough to allege and prove that the tribunal erred in his decision; or that perjured testimony was introduced and considered, unless such perjured testimony was given by the beneficiaries of the judgment, or by their procurement. (*Black on Judgments, Vol. 1, Sec. 323.*) It will be taken for granted that the court or tribunal fairly weighed and considered such testimony and disregarded it. The judgment itself must be corrupt, or procured by corrupt means, or the court must have acted without jurisdiction, in order to render it a nullity.

"In all cases where claimants have appeared before tribunals or commissions, established by the Cherokee Nation, and have had their cases considered fairly and honestly, this Court will not disturb the judgment. The burden of proof will be upon those who allege a fraudulent judgment to prove it. The law presumes, not only that the acts of courts, but the transactions of individuals are honest. Those who allege fraud are required to establish it conclusively. (*Black on Judgments, Vol. 1, Sec. 321*, and authorities there cited, namely, *Jones vs. Britton, 1 Woods, 667; Caldwell vs. Fifield, 24 N. J. Law, 150.*)

"In all cases where a tribunal or commission, having jurisdiction of the case, has passed upon it, the decision will be binding upon this Court, unless it clearly appears from the evidence in the case that the judgment is so fraudulent that a court of competent jurisdiction should set it aside and declare it a nullity.

"Frequent reference has been made in the briefs and arguments of counsel in citizenship cases to the case of *John Elk vs. Charles Wilkins*, decided by the Supreme Court of the United States, and reported *112 U. S. Reports, pages 94 to 123*. The plaintiff in this case brought suit against the defendant, who was one of the registrars of election in the city of Omaha, Nebraska, for refusing to register him as a voter, and for refusing to permit him to vote at an election in that city, in April, 1880. The defendant refused to register and to permit plaintiff to vote on the ground that he was an Indian, and not a citizen of the United States. In that case the Supreme Court of the United States held as follows:

" 'An Indian, born a member of one of the Indian tribes within the United States, which still exists and is recognized as a tribe by the Government of the United States, who has voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a state, but who has not been naturalized or taxed or recognized as a citizen, either by the United Sates or the state, is not a citizen of the United States, within the meaning of the first section of the Fourteenth Article of the Amendment of the Constitution.'

" It will be seen from this quotation from the syllabus in that case that an Indian who had separated himself from his tribe, but who had not been naturalized or taxed or recognized as a citizen, either by the United States or the state, is not a citizen of the United States. The Court further on in its opinion in this case held as follows:

" 'The alien and dependant condition of the members of the Indian tribes could not be put off at their own will, without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorized individuals of particular tribes to become citizens on application to a court of the United States for naturalization, and satisfactory proof of fitness for civilized life; for example of which see treaties in 1817 and 1835 with the Cherokees and in 1820, 1825 and 1830 with the Choctaws.'

"Reference is had, it will be seen, from these quotations from the decisions of the Supreme Court, to the treaties with the Cherkees in 1817 and in 1835. The treaty with the Cherokees in 1817, Article 8, provides as follows:

" 'And to each and every head of any Indian family residing on the east side of the Mississippi river on the lands that are now

or may hereafter be, surrendered to the United States, who may wish to become citizens of the United States, the United States do agree to give a reservation of 640 acres of land, in a square, to include their improvements, which are to be as near the center thereof as practicable, in which they will have a life estate, with reversion in fee simple, to their children, reserving to the widow her dower, the registry of whose names is to be filed in the office of the Cherokee Agent, which shall be kept open until the census is taken as stipulated in the third article of this treaty: Provided, That if any of the heads of families, for whom reservation may be made should remove therefrom, then, in that case, the right to revert to the United States.'

"The treaty of 1835, referred to in the decision of the Supreme Court, Article 12, contains this provision:

"'Those individuals and families of the Cherokee Nation that are averse to a removal to the Cherokee country west of the Mississippi, and are desirious to become citizens of the states where they reside, and such as are qualified to take care of themselves and their property, shall be entitled to receive their due proportion of all the personal benefits under this treaty for their claims, improvements and per capita as soon as an appropriation is made for this treaty.'

"There was an additional provision allowing the Indians referred to in that article to have a preemption right to 160 acres of land to be given to those who were desirious to reside within the states of North Carolina, Tennessee and Alabama. A supplemental treaty to this, proclaimed May 23, 1836, relinquished and declared void the preemption rights and reservations provided for in the treaty of 1835.

"These two articles, however, in the treaties of 1817 and 1835, clearly indicate the intention of Congress that such Cherokee Indians as were averse to removal to the country west of the Mississippi, might become citizens of the states where they resided.

"In the case of the *United States vs. Boyd et al*, decided by the Circuit Court of the United States for the Western District of North Carolina, in June, 1895, (*68 Federal Reporter, pages 577, 585*) it was held that 'the Indians belonging to the Eastern Band of Cherokees in the State of North Carolina have never become citizens of the United States, and the Federal Courts have jurisdiction to entertain a suit brought by the United States, as guardian of such Indians for the protection of their interests.'

"In the opinion of the Circuit Court of the United States in this case the Court used this language: 'By the treaty of New Echota (treaty of 1835) individuals and families who were averse to removal with the nation were suffered to remain in the states

in which they were living, if they were qualified to take care of themselves and property, and were desirious of becoming citizens of the United States. Those who exercised these privileges terminated their connection with the Cherokee Nation.' (*Eastern Band of Cherokee Indians vs. United States, 117 U. S., 288; 6 Sup. Ct., 718.*) Did this make them citizens of the United States? The Circuit Court here quotes with approval the decision of the Supreme Court in the case of *Elks vs. Wilkins, supra*, and then continues as follows: 'There is nothing in the record going to show that these Indians (Eastern Band of Cherokees) were ever naturalized.' Have they been made citizens by treaty? Article 12 of the treaty of 1835 is then quoted by the Circuit Court, and its opinion continues as follows: 'This does not confer on them citizenship. It only authorized them to become citizens when it is recognized that they are qualified or calculated to become useful citizens.'

"The Court then pointed out that they could only become citizens of the United States by naturalization. The Court continued as follows: 'But it must be understood that these Cherokee Indians, although not citizens of the United States, and still under pupilage, are independent of the State of North Carolina. They live within her territory. They hold lands under her sovereignty, under her tenure. They are daily in contact with her people. They are not a nation or tribe. They can enjoy privileges she may grant. They are subject to her criminal laws. None of the laws applicable to Indian Reservations apply to them. All that is decided is that the Government of the United States has not yet ceased its guardian care over them nor released them from pupilage.'

"It is clearly held in this opinion of the Circuit Court of North Carolina that the Eastern Band of Cherokees is not a part of the Cherokee Nation as now constituted. And if the Eastern Band of Cherokees, which has preserved a distinct tribal organization under the tutilage of the United States, is not a part of the Cherokee Nation as now constituted, it follows even with greater force that those Indians who removed with their effects out of the old Cherokee Nation before the removal of its citizens west of the Mississippi River, as well as those who have moved from the limits of the nation as now constituted and become citizens of any other government, have forfeited all their rights and privileges as citizens of the Cherokee Nation.

"A careful examination of the treaties which have been made with the Cherokee Nation by the United States will clearly establish the fact that nowhere does it appear that the Cherokee Indians, who have separated themselves from the tribe or taken up their residence in the states, are taken into consideration,

except the provisions in reference to the Eastern Band of Cherokees, and those in reference to Cherokees who accepted reservations of land under Article 8 of the Treaty of 1817, and those who received their due proportion of all personal benefits accruing under the Treaty of 1835, Article 12. The treaties in reference to those classes of Cherokee Indians recognized the fact that they had separated themselves from and ceased to constitute a part of the Cherokee Nation. And, as is held by the Supreme Court of the United States in the case of the Eastern Band of Cherokees against the Cherokee Nation, *supra*, these Indians 'ceased to be a part of the Cherokee Nation and henceforth they became citizens of and were subject to the laws of the states in which they resided.' And further, if the Cherokee Indians, who have separated themselves from the Cherokee Nation have taken up their residence in any of the states of the union, wish to enjoy the benefits of citizenship in the Cherokee Nation, they must comply with the Constitution and laws of the Cherokee Nation and be readmitted to citizenship as therein provided. 'They cannot live out of its territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the nation. By the terms of the various treaties between the United States and the Cherokee Nation, during the time the nation was divided into the Eastern and Western Tribes, the annuities were divided between the two branches of the nation, according to their respective members to be ascertained by a census to be taken. The annuities thus divided were regularly paid as stipulated until commuted by the Treaty of 1835. This clearly shows that the United States regarded those Cherokees only who were citizens of the nation as entitled to annuities, and as having any right or interest in Cherokee lands or property.'

"In determining who are citizens of the Cherokee Nation, the following propositions will govern this Court:

"First: That those Indians who have separated themselves from the present Cherokee Nation, or from the old Cherokee Nation east of the Mississippi River, and have taken up their residence in the states, and have moved their effects out of the limits of the nation and the Eastern Band of Cherokee Indians who remained in the states after the Treaty of 1835, have forfeited all their rights and privileges as citizens of the nation, and that such persons cannot regain their citizenship unless they comply with the Constitution and laws of the Cherokee Nation and be readmitted to citizenship as therein provided.

"Second: That this court recognizes the legislation of the Cherokee Nation constituting the Supreme Court, and thereafter the Chief Justice of the Supreme Court, tribunals to pass upon certain classes of citizenship cases, and also the legislation of the

Cherokee Nation creating commissions with prescribed powers to pass upon applications for citizenship in the Cherokee Nation, as passed in accordance with the general legislative power of the nation, and will respect such legislation to the extent that it may be in accordance with the Constitution and laws of the United States and the treaties made between the United States and the Cherokee Nation. In construing such legislation the Court will apply to it the same general principles of statutory construction which should be applied to the Statutes of any of the states of the union, or to the Statutes of the United States.

"Third: That blood alone is not the test of citizenship in the Cherokee Nation. That those Cherokees, and their descendants, who have separated themselves from the nation, and have removed their effects from it and taken up their residence in any of the states of the Union have ceased to be citizens of the Cherokee Nation.

"And further, that *bona fide* residence in the nation is essential to citizenship.

"Fourth: Full faith and credit will be given to the judgments of the tribunals and commissions in citizenship cases, unless it is made to appear that the tribunal or commission acted without jurisdiction, or that its judgment was procured by fraud, as more fully explained in this opinion. The acts of the Cherokee Council in determination of applications for citizenship in the nation will be regarded as judgments of a court and will be subject to the same tests as to their validity."

We will now proceed to see whether or not the principles we have endeavored to present on our side dispose of the case immediately in hand. The record on both sides discloses the fact (*Record, page 19*) that not only did the applicants apply to the National Council for admission and were denied, but that they went before a commission on citizenship, (*Record, page 16*), which, after a full hearing, rendered judgment against them. It has been too frequently held to need the citing of any law to sustain it, that the judgments of the tribunals of the Five Civilized Tribes are as valid and binding everywhere as those of the courts of any of the territories of the United States. If there were no other reasons for denying these applicants, the judgment of the Cherokee Commission denying them would be conclusive.

But suppose that judgment has no effect and we put them in the position before the Dawes Commission of an Indian by blood who had never gone before any tribunal of the Cherokee Nation, or elsewhere, and they would still have no right to be declared citizens of the Cherokee Nation. They were not members of the Nation when the treaty of 1835 was made, having previously, according to their own proof, severed their connection with it. They did not consider themselves as citizens of the Nation, and the Dawes Commission had no right to declare them so unless they were in fact so. Let us see now if the history of the principal applicant and his people does not amply sustain this statement.

William Stevens, it seems, was born in Clark county, Ohio, in 1827, moving in 1849 to Illinois, where his mother joined him in 1852. The two went to the Cherokee Nation in 1870. Stevens seems to have had no knowledge whatever of his father. He did not really seem to have known his name until he was informed of it by his alleged uncle, William Allenton, who devised pretty much all of the history connected with this case. Where this father came from, where he went to, or what his end was, this romance fails to disclose. His mother's name was Sarah. After application was made in this case to the Cherokee authorities it was somewhere learned that her maiden name was Sarah Ellington, or Allenton. She, it seems, had never had occasion to write it, but her brother, who seems to have kept the family name, as well as all of its secrets and history, had always spelled it Allenton. Her father, she claims was a celebrated Indian by the name of Captain Shoe-boots. His Indian name was Te-as-ki-yarga. This Indian was a very picturesque character and was very fond of the trappings and fixings of military life. It is said that he fought in the war of 1812. At any event the fact that he after-

wards attired himself in military dress, wore a sword danggling at his side in time of peace, made him a well known character at that time.

This character further distinguished himself after that time by marrying a negro slave by whom he had three children. The connection of these applicants with Captain Shoe-boots is claimed to have been long anterior to his achievement of these distinctions, because they say that the grandmother of William Stevens, whose name it seems they found out late in life to be Clarinda, was, in 1780, a young girl in the State of Kentucky, at which time she was taken a prisoner by a band of maruding Cherokees and taken to the reservation of the Cherokee Indians in Georgia, where, at the age of 16 she was taken as wife by Captain Shoe-boots. There were born to them it seems, in the Cherokee Nation, three children, John, Sarah (mother of applicant) and William, respectively in the years 1794, 1796 and 1801. In 1802, a year after William was born, this woman was induced by her relations in Kentucky to return to them on a friendly visit, which lasted until she died in 1840, never returning to her husband, and he never seeking to know the fate of his three children. It is claimed that the girl, Sarah, married in 1820, and removed in 1825 to the State of Ohio, where in 1827 her son William, the applicant was born. The record, however, discloses that in the same year she was in Kentucky, where she heard of her father's death in the Cherokee Nation, which was then in the State of Georgia, and that she returned there and got here father's patrimony, though no witness who ought to have known anything about this ever heard her make any statement about it. Although she lived in the Indian Territory for a number of years and died in October, 1875, she left no written evidence or testimony of the truth of the claims asserted by her descendants. Many of the

witnesses whose testimony is in the case had testified at different times and before different officers and courts. We will give an abstract of some of the more important of this class with a few comments on their inconsistencies and improbabilities:

Jno. L. McCoy, before Agent Tufts, 1880, (*Record, p. 10*):

"He saw the mother of applicant in 1827 in the Cherokee Nation, when she came from Kentucky to get her patrimony. She was acknowledged as Shoe-boots' daughter. Saw her again at Tahlequah in 1874 or '75. Her son was with her."

She had already moved to Ohio in 1835, having married in 1820. In 1827 she was 33 years old and in 1874 or '75 would have been 80 or 81. Again, 1827 was the year applicant was born in Ohio.

Same witness (*Record, p. 11*) in 1888:

"He understood Mrs. Stevens' name was Annie (*Record, p. 12*). She said William was her son. Her mother was a white woman, so he was informed."

Mrs. Stephens was recognized by no one as a Cherokee except him. Stevens informed him that they moved from Illinois to Kansas.

Same witness, September 28. (*Record, p. 11*):

"He knew Mrs. Stevens and that she was a halfblood Cherokee. Knew her in old Cherokee Nation where he met her mother 60 years ago. Knew Mrs. Stevens' father, a fullblood, called Captain Shoe-boots."

It will be seen also in the record that he married a negro and has plenty of his colored descendants in the present Cherokee Nation as appears by record in case of *William Shoe-boots, rejected claimant.*

Same witness again testifies (*Record, page 32*):

"Came from home to Tahlequah and met Stevens. Stevens asked him if his name was Alex; told him that was his father's

name. Said he heard his mother speak of Alex McCoy, and stated his mother was a daughter of Shoe-boots. Told Stevens he knew Shoe-boots back in the old nation. Remembers a lady's stopping at his father's who claimed to be a Cherokee, and said she was from Kentucky; had learned of her father's death—her father was Shoe-boots. His father advised her how to get her father's property. Understood she was successful in her business and returned to Kentucky. Stevens asked if I would know his mother, and I told him I thought I would. She resembled her father."

Describes the father:

"Shoe-boots was a very peculiar looking man, from the fact that he was a very tall man—his garb was that of a military officer's style. He wore boots, the legs of which reached above his knees. His hat was that of a British military hat, with a red plume in front, that is straight up. His coat was a British military uniform coat, which was kipped with red scarlet cloth. Next is, he wore a strap across his shoulders, and on that strap 'swung a long sword.'

"He knew Mrs. Stevens for she was 'the very model of her father.' Saw her in 1826 or 1827 at his father's house. She was then unmarried. He was 16 years old then." *Comment.*—Mrs. Stevens was married and living in Ohio in 1826 and 1827. Wm. Stevens was born in 1827. Compare his three statements.

Wm. Ellington Shoe-boots before commission in 1883, (*Record, page 12*):

"84 years old—resides in Booco county, Texas. Father was Shoe-boots, Cherokee name, Te-as-ki-yarga. Born in Hightower, Ga. Went to Kentucky. Father sent a negro and some ponies 'with *me* and my mother to Kentucky to see some of my mother's people.'

"Lived near Mt. Sterling, Ky., with his uncle, Jacob Ellington. Claimant's mother went to Ohio. Says Wm. Stevens' father was a white man, named Robert Stevens. Wm. Stevens' mother was his sister. Never went back to Georgia, from Kentucky. Had one brother and one sister. Drew old settlers' payment in 1852. Recollects seeing his father, but he was so little he doesn't recollect much about him. Must have been two or three years old when he went from Georgia to Kentucky. Never saw his father afterwards. Mother told him he was a Cherokee. Never saw claimant until six or seven years ago. Might have seen him or his brother, Jake."

Where is Jake?

Left Georgia in 1802. So if he was born 1801 as alleged in petition, he was a year old and could not have known much of his father, and as little of the trip with the negro and the ponies. Besides, if he was 84 years old in 1883 as sworn to, he was born in 1799. From whom did he get his family history? No man or woman by name of Wm. Shoe-boots drew in 1852. See proof below.

He again (*Record, page 30*) says:

"Son of Te-as-ki-oka—Shoe-boots. Mother's name, Clarinda Ellington In 1801 and 1802 when he was six or seven years old, mother took him, brother John and sister Sarah to Mt. Sterling, Ky., to see her people; his father sent a negro man along by the name of Mingo. Sister Sarah married a man by the name of Robert Stevens and moved to Ohio. 1851 he came back to the nation and stayed with Jess Mayfield, living 25 miles from Tahlequah. Remained here four or five months, establishing his rights to citizenship. Proved his right to satisfaction of Cherokee Council and was admitted, and drew 'old settlers' money of $1,544.25 and returned to Texas. Knows Wm. Stevens to be the son of his sister Sarah."

Never was admitted by council; none of his relations were old settlers. Never saw Wm. Stevens as a boy and could not possibly have known he was his sister's child. Signs his name Shuboots. Though born in 1802, he says he was six or seven years old in 1801 or 1802.

John Harnage, 1887, before Senate Committee. (*Record, p. 15*):

"Seventy years old. Resident of Kilgore, Texas. In the year 1851 William Ellington drew annuity from Cherokee Government. Has no knowledge of William Stevens being a relative of Shoe-boots. Never heard Ellington speak of him, heard him speak of one or two sisters. Has a faint recollection of seeing William Shoe-boots. Knew of Ellington's history by investigation before committee by nation to determine who were entitled to draw. Evidence showed Ellington's mother a white woman.

but did not show he had any brother. Ellington took his mother's maiden name."

By whom in this country could Ellington have proven his right to old settlers' money, having left the old nation when a year old. He came here after 1835. His testimony is a tissue of lies from beginning to end.

William Harnage, before Allen Ross, Sept. 13, 1881, (*Record, p. 30*):

"Met William Stevens in February, 1871. When Stevens told him he belonged to Shoe-boots' family, he replied that he had met a half-brother of Shoe-boots' children in Texas, July, 1850. He told Harnage he had two half-brothers and a sister that were Cherokees, but he did not know who the father of the children was, but his mother always told him he was an Indian by the name of Shoe-boots. Said his father's name was Anderson, but the other children's father was called Shoe-boots, but children took their mother's name, Allington. Anderson, one of his half-brothers was out west. Harnage then put him on to the old settler scheme, and saw him afterwards in the nation and understood he established his right and drew his money. Saw him again in nation in 1880 and recollected him as the same man who drew headright in 1850. Had always understood that Shoe-boots had three children by a white woman in the states."

Mrs. M. A. Bigbey, July 22, 1880, (*Record, p. 31*):

"Remembers a man by the name of Allington or Shoe-boots stopped at her house and drew 'old settler' money. Has been re-visited by a man she believes to be same man. His name and date of his birth was recorded in a book by Mr. Mayfield, her first husband, and produces book, and discloses the fact that William Allenton or Shoe-boots was born on 17th of October, 1804."

Ellington states he left Georgia for Kentucky in 1801 or 1802; that he was 6 or 7 years old at that time.

Capt. Nathaniel Fish, before commission November 11, 1882, (*Record, p. —*):

"Eighty-three years old. Was acquainted with old man Tah-se-ke-yah-ke (Shoe-boots); he had a wife and she was black. Said his other wife and children had gone back to their country:

his sister said there were two boys and one girl. Carried weapons, at times a smoking tomahawk, sometimes a sword. What he testifies to he heard Shoe-boots' sister say."

Same witness, before commission in case of William Shoe-boots, August 22, 1887, (*Record, p. 25*):

"Was well acquainted with Capt. Shoe-boots, a relative. Told same story as above, about meeting Shoe-boots and his negro wife. Lived a day's journey in old nation from where Shoe-boots lived. Shoe-boots must have been 60 years old when he first saw him, about four years after Creek war. Never knew of him having any children. Gives Shoe-boots the same Cherokee name he gave in William Stephens' case, and evidently testifies about the same man, Tah-se-ke-yah-ke. Contradicts his statement above, by testifying that Shoe-boots never told him at that time that he ever had any children."

His first testimony is the only shadow of evidence that Shoe-boots ever had a white wife save the uncorroberated and hearsay testimony of William Ellington, which the record in case of William Shoe-boots, a copy of which is attached to this case, shows positively to be untrue, and that his wife was Dolly, a negro woman, who had several children, one of which, John, was sold south from the nation. Fish again testifies he did not know Shoe-boots had any children. See particularly the testimony of Mrs. Darkey Sangee. She says that Capt. Shoe-boots, who had the negro wife, had for his Cherokee name Tah-se-kah-yah-kee, and that his negro wife had three children, two boys and one girl, corresponding exactly with the manufactured history in this case.

The proof in the other case shows that Capt. Shoe-boots did have a negro daughter by old Dolly named Elizabeth. William Shoe-boots and others swear that his father, Tah-se-ka-yah-ki, was Capt. Shoe-boots, and that his wife was the negro Dolly.

William Shoe-boots, colored, drew "old settler" money, and it was he doubtless and not William Ellington that drew this

money. His mother came here as old settler, whereas neither William Ellington or his alleged relations did.

In conclusion we would say that this claimant sets much store by the report of the commission on citizenship and the letter of the chief to council. It is perfectly evident that both were made on evidence not in the case, but adduced in case of William Shoe-boots, and that the two cases, which are wholly different, were confused.

The William Shoe-boots claimants proved Indian blood and confessed their mother Dolly, wife of Captain Shoe-boots, was a negro, but tried to prove that they were freeborn. The report itself is ample proof of this (*Record, p. 16*), in that it says:

"William Stevens alleges as his Cherokee ancestor, from whom he has endeavored to prove his rights to citizenship, one William Shoe-boots, and William Shoe-boots alleges as his Cherokee ancestor, from whom he has endeavored to establish his citizenship one John Shoe-boots. These names, William and John Shoe-boots, fail to appear on any rolls of Cherokee mentioned in the seventh section of Act of December 8, 1886, or those mentioned in Act of February 7, 1888.

"William Shoe-boots is a son of old Te-as-ki-yarga, a Cherokee Indian, who died prior to the treaty of 1835, and the brother of Lizzie and Polly Boots, whose names appear on the emigrant roll of Cherokees in Delaware District, for the year 1852 as Cherokees."

What evidence connects Polly and Lizzie Boots with William Shoe-boots? The rolls do not, the only evidence of their existence. (*Record, p. 35.*)

Now William Stevens has not alleged or attempted to prove any such thing; but all that proof appears in the negro case of William Shoe-boots. There is not in this case a scintilla of reliable or reasonable proof that William Stevens is a descendant of Captain Shoe-boots, or Te-as-ki-yarga, or that the latter ever had a white wife. There is indeed positive and unequivocal proof of

the contrary. Is it not strange that in these years of striving for citizenship, in a contest which began 25 years ago, that William Stevens' mother, who only died in 1875, never made a statement orally, or in writing, to anybody; and that Stevens himself never made an affidavit before this application, and that he now states as the sole authority for his facts, his deceased mother? According to their record his grandmother lived with Captain Shoe-boots fourteen years before they had children, and then immediately after the birth of three children, left him to return no more. The daughter only returning to get her dead father's property, which the proof shows consisted only of a negro woman, his wife, and three negro children.

There are a number of cases before this Court which have some features which distinguish them from the majority. One or more of the cases involve the question of the right of the nation to revise by subsequent proceedings the judgments of its several citizenship commissions, admitting claimants to citizenship. Several of these persons gained their citizenship as contended by the nation, through fraud and bribery, and subsequent commissions were created to inquire into those decisions and determine the question of fraud. We have contended previously in this brief that it was beyond the power of the council under the Cherokee constitution to pass acts delegating to commissions or courts the right to admit citizens, this being under the Cherokee constitution exclusively a legislative function. If, then, the council went beyond its constitutional authority no jurisdiction was conferred on these commissions, and advantage might be taken of this want of jurisdiction at any time and in any proceeding.

1 Black on Judgments, Sections 278, 279.
Grimmet vs. Askew, 48 Ark., 156.

Hall vs. Lanning, 91 U. S., 160.
Pennoyer vs. Neff, 95 U. S., 714.

But granting *gratia argumenti* that these several acts are not unconstitutional, we fail to see how appellees can be bettered thereby, for the same plea of *res judicata*, if sauce for them, is equally sauce for us, and we had the last inning.

When these judgments were subsequently opened up the judgments by which the applicants were admitted to citizenship were not pleaded and, therefore, they are bound by the judgments of the commissions which last investigated their cases.

"The last judgment rendered in regard to a matter is *res judicata*. The former judgment must be used to prevent it. It calls upon the adverse party to show all his reasons why it should not be rendered; and one of his reasons is that another court has determined the matter. But if he does not bring that fact to the attention of the court, or if he does do so and it is disregarded, in either case the former judgment the same as all other defenses, is concluded."

1 Van Fleet, Former Adjudication, p. 91, and authority cited.

See also

1 Van Fleet, Former Adjudication, p. 505.

Again this Court has decided that when any person was adopted by an Indian Nation that the same power which adopted him and conferred citizenship on him, could take it away.

Roff vs. Birney, 168 U. S., 218.

It has been contended all along that these judgments, if judgments they were, could not be opened up for fraud.

The principle that every judgment and decree may be opened,

vacated and set aside for fraud, is too well settled to need any other authority than the statement of the proposition.

"It is a well settled principle of equity that fraud vitiates all transactions, even the most solemn, and judgments are not beyond attack on this ground."

Herman on Estoppel, Section 591.

"Fraud vitiates everything and a judgment equally with a contract."

Wells on Res Judicata, Section, 499.

If it be said that the Court rendering the original judgment had ceased to exist, or that this was legislative interference, we reply that the Court derived all its powers in the first instance from the council, and the admission of any warrant of law for such a grant of powers carries with it necessarily the right to pass the laws under which the commissions acted, for in each instance the only thing which breathed the breath of life into their proceedings was the delegated authority of the council. If the council was acting through the first commission, it is the council still which acted through the others.

The rule is, however, perfectly well settled that "to establish fraud it is not necessary to prove it by direct and positive evidence." "If the evidence is sufficient to satisfy the mind and conscience of the existence of fraud, it will suffice." The leading American case is that of *Kaine vs. Weigley, 22 Pa. St., 179*, which is inaccessible to counsel for appellee, but the doctrine is reaffirmed in *Burt vs. Timmons*, (*W. Va.*,) *6 Am. St. Rep., 664*, and the meat of Chief Justice Black's opinion in *Kaine vs. Weigley*, is quoted.

Graver vs. Faurot, 22 C. C. A., 156.

The Cherokee Nation was a sovereign so far as its acts affecting those it had jurisdiction over was concerned. It had a right to prescribe any method it saw fit to open up the judgments of its courts or commissions. In fact they were not courts, the judges of the courts sat merely as a commission.

U. S. vs. Farrier, 13 How., 52.
U. S. vs. Ritchie, 17 How., 525.

It has been decided that the United States might, notwithstanding the general rule as to conclusiveness of judgments, and particularly of judgments of naturalization, maintain a bill to cancel and set aside a judgment of naturalization where the same had been fraudulently procured just as it might maintain a bill to cancel letters patent procured by fraud.

United States vs. Norsch, 42 Fed., 417.

We do not apprehend the correctness of such a proposition will be seriously controverted, and we think it equally clear that within the limits of its functions the Cherokee Nation is possessed of the same powers as any other sovereignty. That as the United States has complete control over its citizenship, so the nation has complete authority over Cherokee citizenship and where a judgment of citizenship has been obtained by fraud practiced upon her courts or other tribunals the Cherokee Nation may proceed in due form of law to vacate and set aside those judgments, and especially such as conferred the political right of citizenship.

The Cherokee Nation not being bound by the rules of common law but only by its own constitution and the Constitution of the United States may lawfully adopt whatever proceedings shall to its legislative power seem most proper; and constitute whatever tribunal it pleases for opening, vacating and annulling

these fraudulent judgments, the sole requirement being that what is done shall be by due process of law.

Referring again to our position, that a proper construction of the language of the law granting appeals to this Court limits the Court to the consideration solely of the constitutionality of the law, and that any other construction would make much of the sentence surplusage; it is a well settled rule in such cases that the language must be given that construction which will render the whole of it, if possible, intelligible and avoid surplusage.

Montesquey vs. Heil, 23 Amer. Decs., 471.
Gates vs. Salmon, 95 Amer. Decs., 139.

It has been suggested that the comma after "citizenship cases," warrants a different construction, but this Court has said that in arriving at the real meaning of the lawmakers, we must, if need be, disregard the punctuation.

Hammock vs. Farmers Loan and Trust Co., 105 U. S., 77.

Respectfully submitted,

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